TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1955

No. 33

LOCAL UNION NO. 25 OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, ET AL., PETITIONERS

vs.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY

ON WRIT OF CERTIORARI TO THE SUPERIOR COURT OF THE COMMONWEALTH OF MASSACHUSETTS

PETITION FOR CERTIORARI FILED FEBRUARY 11, 1955

CERTIORARI GRANTED MARCH 28, 1955

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

IN THE SUPERIOR COURT OF THE COMMONWEALTH OF MASSACHUSETTS

Suffolk, 55. No. 65809 Eq.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, Plaintiff,

vs.

LOCAL UNION NO. 25 OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, and the Following, as Individuals and Representatives of Said Local Union No. 25 of Boston, Massachusetts: Edward F. Jenkins of Boston, President; Michael J. Norton of Boston, Business Agent; and William J. McCarthy of Boston, Business Agent, Defendants

BILL OF COMPLAINT—Filed July 15, 1952

Respectfully Represent. . . .

1. The plaintiff, the New York, New Haven & Hartford Railroad Company, is a corporation duly organized under the laws of the Commonwealth of Massachusetts and has its usual place of business in Boston, Massachusetts.

[fol. 2] 2. (a) The plaintiff is engaged in the transportation of general commodities in interstate commerce and is subject to the provisions of the Interstate Commerce Act, Part I (49 U.S.C. et seq.)

(b) The plaintiff is subject to the provisions of the Railway Labor Act (45 U.S.C. Sec. 151 et seq.).

3. Upon information and belief, the defendant Edward F. Jenkins is the president of the Teamsters, Chauffeurs, Warehousemen and Helpers of America, International Brotherhood, Local 25 A. F. of L. (hereinafter called "defendant Union").

4. Upon information and belief, the defendants, Michael J. Norton and William J. McCarthy are duly authorized and designated business agents and delegates of the defendant union.

5. (a) Upon information and belief, the defendant union is a voluntary association of employees organized and existing for the purpose of dealing with motor carriers concerning wages, hours and other terms and conditions of employment of motor carrier employees and maintains a principal office within the City of Boston.

(b) The individual members of said defendant union are too numerous to be joined individually as defendants and this action is brought against each and every member of said defendant union as fully as if each were individually named, the defendants more specifically named being connected with and fairly representative of the entire membership.

6. Upon information and belief, the defendant union is not authorized under the terms of its charter to negotiate with or enter into collective bargaining agreements with the plaintiff.

7. The plaintiff, in the course of performing its duties as a common carrier by rail, transports semi-trailers on flat cars in interstate commerce; such service is performed pursuant to tariffs duly filed with the Interstate Commerce Commission; and that pursuant to tariffs the afore-described service is a common carrier service available to the public generally.

[fol. 3] 8. Upon information and belief, the defendant union has collective bargaining agreements with numerous motor carriers operating in, through *the* to the City of Boston, Massachusetts, and the such agreements have been in force and effect for approximately 10 years.

9. Upon information and belief, under the terms of the various collective bargaining agreements, motor carriers are not prohibited from delivering flat cars to the plaintiff's railroad yards for further transportation by rail.

10. The plaintiff, since December, 1937, has transported semi-trailers on flat cars in interstate commerce.

11. The plaintiff has numerous contracts with shippers and motor carriers for the rendition of the afore-described service.

12. At all times hereinafter mentioned, the plaintiff owned and operated a railroad yard (hereinafter called Yard 5) in the vicinity of Northern Avenue, Suffolk County, City of Boston.

13. On or about July 11 and 12, 1952, the defendant union and the individual defendants in the vicinity of Yard 5 coerced, compelled and ordered various motor carriers and shippers of freight to divert semi-trailers from Yard 5 and hereby prevent the unloading of said semi-trailers on flat cars in the manner afore-described and interfered and restrained the transportation of said semi-trailers in interstate commerce.

14. On or about July 14, the defendant union and the individual defendants ordered and enforced a picket line at the entrance to Yard 5 with the express purpose and design of preventing motor carriers and shippers from entering upon said Yard 5 and thereby prevent the loading of semi-trailers on flat cars for transportation in interstate commerce.

15. That by reason of such coercion and picketing, the plaintiff was unable to perform its duties as a common carrier and was compelled to breach its transportation contracts with various shippers.

[fol. 4] 16. The plaintiff does not employ any members of the defendant union and there is no labor dispute existing between the complainant and the defendant union or the individual defendants or any members of the defendant union.

17. (a) Upon information and belief, the defendant union and the individual defendants have unlawfully and maliciously conspired together to injure and ruin the plaintiff and its business and have induced the breach of contracts between the complainant and various other parties.

(b) Upon information and belief, the defendant union and the individual defendants have been and are now engaged in an unlawful secondary boycott.

(c) Upon information and belief, the defendant union and the individual defendants claim that there is a labor dispute between the defendant union and various motor carriers and shippers, the object of which consists, in substance, of a demand by the defendant union that semi-

trailers be transported over the highway by motor carrier units and not transported on freight cars over the rails.

(d) Upon information and belief, the defendant union and the individual defendants have been and are now engaged in an unlawful and secondary boycott arising out of the labor dispute between the defendant union and various motor carriers with the object of forcing and requiring the complainant to cease transporting semi-trailers owned and operated by motor carriers and shippers and to cease doing business with such motor carriers and shipper.

(e) The transportation of semi-trailers on flat cars does not constitute the greater part of its current business over a representative period.

18. The complainant has invested substantial sums of money and has employed a large personnel for the purpose of rendering the service of transporting semi-trailers by flat cars in interstate commerce.

[fol. 5] 19. The picketing and interference afore-described will result in a loss of the aforesaid investment of the complainant and loss of employment by numerous employees of the complainant.

20. By reason of the unlawful picketing and secondary boycott the complainant is subject to liability by numerous shippers for failure to perform contracts of common carriage.

21. The complainant will suffer irreparable injury if the defendant continues to enforce the illegal picket line and the unlawful secondary boycott in that its substantial investment will be lost, its contracts with shippers will be violated and business secured by the complainant over a period of many years and at great expense will be permanently lost by the complainant.

Wherefore the Complainant Prays that:

1. A temporary restraining order issue restraining the defendants and each and every one of them and all persons acting in aid of, in conjunction with or in concert with the defendant and each and every one of them from interfering with the plaintiff's business by inducing, threatening or hindering any person, company, corporation, firm or

association from delivering semi-trailers for transportation on the plaintiff's flat cars or from entering or leaving the premises of the plaintiff's railroad yards for the purpose aforesaid.

2. A temporary restraining order issue restraining the defendants and each and every one of them and all persons acting in aid of, in conjunction with or in concert with the defendant and each and every one of them from picketing or otherwise patrolling the premises of the plaintiff's railroad yard or in any other way to interfere with or prevent the loading or unloading of freight of any kind or nature or description from or to semi-trailers, flat cars, box cars or other transportation equipment used and employed by the plaintiff.

3. An injunction may issue restraining the defendants and each and every one of them and all persons acting in aid of, in conjunction with or in concert with the defendant [fol. 6] and each and every one of them from maliciously inducing the breach of contracts between the plaintiff and any third persons.

4. The plaintiff be awarded damages in the sum of $100,000.

5. The plaintiff receive such other and further relief as to this Honorable Court may seem just and proper in the premises.

Edmund J. Moore, Herbert Burstein, Attorneys for the plaintiff.

Sworn to before me on 15th day of July, 1952, by Edmund J. Moore. David E. Place, Notary Public. My Commission expires Oct. 10, 1955.

July 15, 1952.

Notice to show cause to issue with temporary restraining order under prayers 1 & 2 returnable in the First Session Without Jury at 10 o'clock A.M. on Thursday the 24th day of July 1952. (Swift, J.)

Attest: Richard A. McLaughlin, Asst. Clerk.

IN SUPERIOR COURT OF SUFFOLK COUNTY

Motion to Dissolve Temporary Restraining Orders--
Filed July 16, 1952

Now comes the Defendants, each and every above-named, and appear specially and solely for the purposes of filing this Motion;

[fol. 7] And the Defendants, each and every above-named, do hereby move that the Temporary Restraining Orders, issued in the above-entitled matter on July 15, 1952, be dissolved.

For the Defendants, each and every above-named, by their attorney.

Stephen J. D'Arcy, Jr.

IN SUPERIOR COURT OF SUFFOLK COUNTY

ACTION OF THE COURT ON MOTION TO DISSOLVE INJUNCTION—
July 30, 1952

This cause came on to be heard upon a motion to dissolve the injunction heretofore issued therein. Evidence was introduced; it was argued by counsel, and citations were submitted to the Court upon two issues—first, whether the Court had jurisdiction of the case and, second, whether this case involves or arises out of a labor dispute within the definition of "labor dispute" as defined by statute.

After due consideration of the evidence, arguments of counsel, and examination of cases cited, I find and rule that this Court has jurisdiction of the case.

I find that this case does not involve or arise out of a "labor dispute" as defined by G. L. (Ter. Ed.) C. 150A, s. 2(7).

In view of the foregoing, the motion to dissolve the injunction heretofore issued in this case is hereby denied, and the injunction is to continue in force until otherwise ordered by the Court.

Jesse W. Morton, Justice of the Superior Court.

[fol. 8] IN SUPERIOR COURT OF SUFFOLK COUNTY

MOTION TO MODIFY RESTRAINING ORDER AND INJUNCTION—Filed August 4, 1952.

Now come the Defendants, each and every above-named, and respectfully pray this Honorable Court to modify and amend the restraining order and injunction heretofore issued and continued in this proceeding.

By Stephen J. D'Arcy, Jr., Attorney for the Defendants, Each and Every Above-named.

IN SUPERIOR COURT OF SUFFOLK COUNTY

MOTION TO MODIFY RESTRAINING ORDER AND INJUNCTION—Filed August 8, 1952.

Now come the Defendants, each and every above-named, and respectfully pray this Honorable Court to modify and amend the restraining order and injunction heretofore issued and continued in this proceeding.

By Stephen J. D'Arcy, Jr., Attorney for the Defendants, Each and every above-named.

This copy of motion ordered filed as and in lieu of the original which has been missing from files.

Attest: Edward J. Kelley, Asst. Clerk.

Aug. 8, 1952, Denied by the Court (Morton, J.).

Attest: Edward J. Kelley, Asst. Clerk.

[fol. 9] IN SUPERIOR COURT OF SUFFOLK COUNTY

REPORT OF MATERIAL FACTS UPON WHICH ORDER DENYING MOTION TO DISSOLVE A PRELIMINARY INJUNCTION WAS BASED—August 15, 1952

I submit herewith a report of all the material facts upon which is based my action in denying a motion to dissolve a preliminary injunction.

After I denied the motion the defendant filed a request for a report under the provisions of General Laws Chapter 214, Section 9A. I have prepared the report and in it state that I report the questions of law among other things upon the transcript of the testimony; after I prepared the report the defendant notified me that he was not going to have a transcript of the testimony, although I feel such transcript is necessary. I feel it is my duty in any event to report the case as requested as above and in consequence thereof submit the following findings for the consideration of the Supreme Judicial Court.

The petitioner is engaged as a common carrier in the transportation of freight and passengers by rail subject to the provisions of the Interstate Commerce Act and to the provisions of the Railway Labor Act. The respondent is a voluntary unincorporated corporation of employees organized for the purpose of dealing with motor carriers' employees. The respondent Jenkins is the President of the respondent union. The respondent Norton and McCarthy are the duly authorized and designated business agents or delegates of the respondent union.

Since December 1937 the petitioner has transported motor truck semi-trailers (hereinafter called trailers) on flat cars by rail in interstate commerce. These trailers are hauled by tractors operated in most instances by members of the respondent union. The trailers are hauled to Number 5 Yard of the petitioner in Boston and are there loaded upon flat cars of the petitioner which spent substantial sums in the construction of such flat cars, and which are so constructed that they are of little or no use except in the transportation of trailers as above set forth.

The defendant union has collective bargaining agreements with various employers (motor carriers) in and around Boston, and is a recognized bargaining union of these em- [fol. 10] ployers. The defendant union has no dispute with any of these employers concerning the performance of aforesaid collective bargaining agreements that is in any way connected with this suit.

The respondent union through the individual respondents and other members thereof have for some time been desirous of securing freight which the petitioner transports on its

flat cars as above set forth, and to secure such for transportation in its members' trailers; such transportation to be conducted over highways to various points both within and without the Commonwealth.

In furtherance of this desire to secure such freight the respondents Norton and McCarthy on July 15, 1952 and for some days thereafter until the preliminary injunction was issued appeared on the highway in front of Number 5 Yard of the petitioner and by signals by hand and by word of mouth indicated in no uncertain terms to operators of tractor trailers that the latter should not either go into or leave Number 5 Yard of the petitioner. These signs were obeyed and the business of the petitioner relative to flat cars was effectually stopped by the personal respondents. For the most part the drivers who were stopped as aforesaid were employees of employers (motor carriers) with whom the defendant union has bargaining agreements.

The greater part of the petitioner's current business over a representative period has not been processing, selling, handling, transporting or otherwise dealing in any goods of the users of the petitioner's flat car service.

Respondents caused to occur a concerted cessation of work and a withholding of service the object of which was to force the petitioner to cease doing business with users of its flat car service.

There has not existed nor does there exist any agreement, understanding or arrangement with users of the petitioner's flat car service according to which the petitioner will be or has been required to use or is using its own employees to perform work or service which would be done by the employees of users of the petitioner's flat car service in the absence of a labor dispute.

[fol. 11] The petitioner has no adequate remedy at law because no legal rule of damages can fully compensate the petitioner for that portion of its business which the petitioner will lose if the unlawful acts are not restrained.

I find that the action of the respondents as aforesaid caused damage to the petitioner of several thousand dollars until stopped by the preliminary injunction; that the respondents unless enjoined will continue to interfere with the flat car business of the petitioner and in so doing will cause

irreparable damage to the petitioner. No damage will be caused to the respondents by continuing the injunction except that by some possibility if the injunction were not continued in force some freight might be secured by the respondent or its members for transportation over the road.

It is upon the foregoing facts that I rule that this court has jurisdiction of the case, and that there is no labor dispute between the parties as defined in Section 20C of Chapter 149 of the General Laws. In my statement denying the motion to dissolve the injunction I incorrectly referred to Chapter 150A, Section 2(7).

Jesse W. Morton, Justice of the Superior Court.

IN SUPERIOR COURT OF SUFFOLK COUNTY

MOTION TO FILE SUBSTITUTE BILL OF COMPLAINT—
July 25, 1952

The petitioner respectfully prays this Honorable Court for leave to file a Substitute Bill of Complaint submitted herewith.

By Herbert Burstein, Attorney for Petitioner.

Allowed.

Jesse W. Morton, J. S. C.

[fol. 12] IN SUPERIOR COURT OF SUFFOLK COUNTY

SUBSTITUTE BILL OF COMPLAINT—Filed July 25, 1952

The petitioner respectfully represents to this honorable Court that:

1. The petitioner, The New York, New Haven and Hartford Railroad Company, is a corporation duly organized under the laws of the Commonwealth of Massachusetts, with an usual place of business in Boston, Massachusetts and is engaged as a common carrier in the transportation of freight and passengers by rail in interstate commerce sub-

ject to the provisions of the Interstate Commerce Act, Part I ((49 U.S.C. Section 1 et seq.)) and to the provisions of the Railway Labor Act ((45 U.S.C. Section 151 et seq.)).

2. The respondent Local Union No. 25 (hereinafter called the "respondent union") of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a voluntary unincorporated association of employees organized for the purpose of dealing with motor carriers concerning terms and conditions of employment of motor carrier employees. It maintains a principal office within the City of Boston and none of the respondent union's members is employed by the petitioner.

3. The petitioner is informed and believes that the respondent, Edward F. Jenkins, is the duly elected and authorized President of the respondent union.

4. The petitioner is informed and believes that the respondents, Michael J. Norton and William J. McCarthy, are the duly authorized and designated Business Agents and delegates of the respondent union.

5. The individual members of the respondent union are too numerous to be joined individually as respondents and this action is brought against each and every member of the respondent union as fully as if each were individually named; the respondents Edward F. Jenkins, Michael J. Norton and William J. McCarthy are connected with (as set forth above) and are fully representative of the entire membership of the respondent union.

6. The petitioner is informed and believes that the respondent union is not authorized under the terms of its [fol. 13] charter to negotiate with or enter into collective bargaining agreements with the petitioner.

7. (a) Since December, 1937, in the course of performing its duties as a common carrier by rail, the petitioner has transported motor truck semi-trailers (hereinafter called "trailers") on flat cars by rail in interstate commerce (which service is hereinafter called "flat car service"). The petitioner's flat car service is available to the general public and charges for it are assessed in accordance with the provisions of tariffs duly filed with the Interstate Commerce Commission of the United States. The petitioner's flat car service is provided, under contracts of carriage in

advance of rendering such service, to two categories of users: (i) motor truck carriers which haul with their own tractors from their own terminals trailers to the petitioner's No. 5 Yard situated in the vicinity of Northern Avenue, Boston, Massachusetts (hereinafter called "No. 5 Yard") where these trailers are moved by tractors up a ramp and placed aboard the petitioner's flat cars and whence, thereafter, these flat cars are transported to various points in interstate commerce along the petitioner's line of railroad; and (ii) shippers who own or rent tractors and trailers and who load their own shipments into such trailers and transport said trailers to No. 5 Yard where the petitioner renders service in the manner as set forth above.

(b) The petitioner is informed and believes that the personnel who drive tractors which haul trailers to the No. 5 Yard in Boston for transportation by flat car as aforedescribed are members of the respondent union.

(c) There is no agreement, understanding, or arrangement with any employer of members of respondent union or any other employer primarily interested in a labor dispute, pursuant to which petitioner has required or now requires its own employees to perform work or services which would be done by employees of any such employer in the absence of a labor dispute.

(d) The greater part of petitioner's current business, over a representative period, does not consist in the aforedescribed trailer on flat car service.

[fol. 14] (e) The greater part of petitioner's current business, over a representative period, does not consist in transporting, handling or otherwise dealing in the goods of an employer engaged in a lawful labor dispute.

8. (a) The petitioner is informed and believes that on July 11 and July 12, 1952, in or about the premises and in the vicinity of the No. 5 Yard, each of the individual respondents and the respondent union coerced, ordered and directed drivers of tractors hauling trailers for transportation via flat car service to refuse to permit the trailers to be loaded upon petitioner's flat cars.

(b) On July 11 and July 12, 1952 by reason of the acts of the respondents as aforesaid, petitioner was prevented from and was unable to load trailers on its flat cars.

9. (a) The petitioner is informed and believes that on July 14, 1952, the individual respondents and the respondent union ordered and enforced a picket line at the entrance in the No. 5 Yard with the express purpose and design of preventing the petitioner from receiving and loading trailers on its flat cars.

(b) On July 14, 1952 the individual respondents and the respondent union prevented the loading of trailers on flat cars and enforced a boycott against petitioner and a withholding of patronage and services by motor truck carriers and shippers.

10. (a) The respondents threaten to continue the acts set forth in paragraphs "8" and "9" of this complaint unless they are enjoined.

(b) The petitioner is informed and believes that the individual respondents and the respondent union will continue to commit the acts complained of in paragraphs "8" and "9" of this complaint and, with actual knowledge thereof, have authorized, adopted or ratified such acts and threats to commit such acts.

11. (a) The petitioner is informed and believes that the object of the acts committed by the respondents on July 11, [fol. 15] 12 and 14, 1952, as set forth in paragraphs "8" and "9" of this complaint was to force or require the petitioner to cease handling and transporting the products of various shippers and motor carriers who employ petitioner's flat car service.

(b) The petitioner is not involved in any labor dispute with the respondents or members of the respondent union, nor is petitioner involved in any labor dispute which may exist between respondents and/or members of respondent union and any employer and/or group of employers.

12. The acts committed by respondents as set forth in paragraphs "8" and "9" and threatened to be committed are unlawful in that:

(a) The said acts were intended to and did, in fact, result in a failure by petitioner to perform its common carrier duties as required under the Interstate Commerce Act, Part I; and

(b) The said acts were intended to and did, in fact, result in a breach by petitioner of its contracts of transporta-

tion with the shipping public and with motor truck carriers; and

(c) The said acts were and are intended to compel shippers and motor truck carriers to assign work to members of the respondent union and to thereby commit an unfair labor practice in violation of the National Labor Relations Act; and

(d) The said acts were intended to and did, in fact, result in a unlawful secondary boycott in violation of the laws of the Commonwealth of Massachusetts; and

(e) The said acts were committed by the respondents, acting in concert, with the intention to harm and damage the petitioner, notwithstanding that respondents, neither severally, nor jointly, have or had a direct and immediate competi*ng* interest in the petitioner's business; and

(e) The said acts were committed by respondents and respondents threaten to continue the same for the purpose of [fol. 16] securing an arrangement, contract or agreement which will create a monopoly in the transportation of articles or commodities in common use, all in violation of the laws of the Commonwealth of Massachusetts.

13. (a) Unless an injunction is granted, the property of the petitioner will be substantially and irreparably injured, in that:

(i) petitioner's substantial investment and its flat car service will be destroyed; and

(ii) patronage by shippers or other services provided by petitioner related to and/or resulting from its flat car service will be lost; and

(iii) petitioner will be subjected to a multiplicity of suits by shippers under the Interstate Commerce Act and the laws of the Commonwealth of Massachusetts for delays in transportation and for other breaches of contracts of carriage entered into between petitioner, shippers and motor carriers; and

(iv) the transportation equipment which the petitioner devotes to its flat car service is peculiarly adapted to that service and is not useful to the petitioner for other transportation purposes. Since the institution of the petitioner's flat car service, it has invested in the equipment used in this service a sum

in excess of three million ($3,000,000.) dollars. During the twelve (12) months immediately preceding the filing of this complaint the petitioner has invested in capital equipment used in its flat car service approximately one million ($1,000,000.) dollars. If, as the result of the acts of the respondents herein named, as above set forth, the petitioner loses those shippers who formerly were patrons of its flat car service, this capital investment will be reduced in value to a nominal sum amounting to no more than one-tenth (1/10th) of its original cost.

(b) The damage to petitioner is not compensible in an action at law. Petitioner has no adequate remedy at law.

(c) As to each item of relief that this court may grant, the injury to the respondents will be less than the injury which petitioner would suffer if injunctive relief is denied.

[fol. 17] 14. (a) The petitioner is informed and believes that there is no labor dispute either between petitioner and/or its employees and respondents and/or members of respondent union or between petitioner and its employees and motor truck operators, shippers and/or their employees or between respondents and the members of respondent union and motor truck carriers and shippers and/or their employees who deliver trailors to petitioner's No. 5 Yard.

(b) The petitioner is informed and believes that if there is a labor dispute which gives rise to the acts complained of herein, the said dispute is unlawful, in that respondents seek to compel petitioner and/or motor truck carriers and/or shippers to commit an unfair labor practice in violation of the National Labor Relations Act, by assigning work to its members, and to violate the laws of the Commonwealth of Massachusetts, by creating a monopoly in transportation.

(c) The petitioner is informed and believes that if there is a lawful labor dispute, the acts of the respondents complained of herein constitute an unlawful secondary boycott by reason of the object thereof, as more specifically set forth in paragraphs "9", "10", and "11" of this complaint.

15. (a) The petitioner has notified the Chief of Police of the City of Boston of the acts of the respondents herein-

above alleged by serving a copy of this complaint upon him.

(b) Notwithstanding that respondents have denied the existence of a labor dispute, the petitioner has made every reasonable effort to settle by negotiation any alleged dispute which the respondents herein named may or can have.

16. There has been no violence or breach of peace and there has been no need for Police protection, although Police officials have been notified of the unlawful acts commit-ed and threatened.

Wherefore, the petitioner prays that:

I. A preliminary injunction issue, forbidding the persons listed in sub-paragraph A hereof to perform the acts listed in sub-paragraph B hereof.

[fol. 18] A. 1. All the respondents;

2. Each of the respondents;

3. All persons acting in aid of the respondents and of each of them;

4. All persons acting in conjunction with the respondents and with each of them; and

5. All persons acting in concert with the respondents and with each of them.

B. 1. Interfering with the petitioner's business;

2. Persuading, inducing or coercing any person, any group of persons, or any corporation, to refrain from transporting between, on the one hand, any trucking terminal or the premises of any shipper and, on the other hand, any freight yard or track of the petitioner located within the geographical jurisdiction of this Court, any trailer or any motor truck tractor, when the purpose of said transportation is to patronize petitioner's flat car service.

3. Persuading, inducing or coercing any person, group of persons or corporation to refrain from loading or unloading freight of any kind, nature or description from or to trailers, flat cars, box cars or any transportation equipment used or employed by the petitioner.

4. Persuading, inducing or coercing any person, group of persons or corporation to breach any contract to which the petitioner is a party.
5. Threatening with harm any person, group of persons or corporation if the petitioner's business is not interfered with, if transportation such as is set forth in sub-paragraph 2 hereinabove takes [fol. 19] place, if loading or unloading such as is set forth in sub-paragraph 3 hereinabove takes place, or if contracts, such as are set forth in sub-paragraph 4 hereinabove, are not breached.
6. Hindering any person, group of persons or corporation from performing transportation such as is set forth hereinabove, in sub-paragraph 2, from executing loading or unloading such as is set forth hereinabove in sub-paragraph 3, or from performing contracts such as are set forth hereinabove in sub-paragraph 4.

II. A permanent injunction forbidding the persons listed in sub-paragraph I (A) of the prayer hereinabove to perform the acts set forth in sub-paragraph I (B) of the prayer hereinabove.

III. The petitioner be awarded damages in the sum of one hundred thousand ($100,000.) dollars.

IV. The petitioner receive such other and further relief as to this honorable Court may seem just and proper in the premises.

Respectfully submitted, The New York, New Haven and Hartford Railroad Company, By Edmund J. Moore, Herbert Burstein, Attorneys.

In Superior Court of Suffolk County

Respondents' Request for Rulings of Law—August 14, 1952

Now come the Respondents, in accordance with the request of this Honorable Court, and submit their requested Rulings of Law:

I. The Respondent Union's disputes with various employers (motor carriers) with whom it has collective bar-

[fol. 20] gaining agreements and the peaceful concerted activities in which the Respondent Union and individual Respondents have engaged, in furtherance thereof, affects commerce within the meaning of Sections 2(6) and (7) of the National Labor Relations Act as amended, the so-called Taft-Hartley Act.

2. It having been alleged in the complaint that unfair labor practices within the meaning of the National Labor Relations Act as amended have been committed by the Respondent Union and individual Respondents, that Act vests the National Labor Relations Board with exclusive primary jurisdiction to determine how much of this peaceful concerted activity shall be prohibited by injunction.

3. Said concerted activities are in the field covered by the National Labor Relations Act as amended, and are therefore preempted and closed to State regulation.

4. This Court is without jurisdiction to enjoin said concerted activities and its action in so doing would invade and infringe the exclusive federal field which the National Labor Relations Act as amended preempts, and would infringe upon the exclusive jurisdiction of the National Labor Relations Board, and would deprive the Respondent Union and individual Respondents of rights protected under the Constitution of the Commonwealth of Massachusetts and the Constitution of the United States.

5. The Respondent Union's disputes with the employers (motor carriers) is a "lawful labor dispute" within the meaning of Chapter 149 of the General Laws, Section 20C, as amended by Section 2(d) of Chapter 452 of the Acts of 1950.

6. None of the activities of the Respondent Union or individual Respondents constitutes activity in furtherance of an "unlawful secondary boycott" within the meaning of Chapter 149 of the General Laws, Section 20C, as amended by Section 2(f) of Chapter 452 of the Acts of 1950.

7. None of the activities of the Respondent Union or individual Respondents were unlawful in and of themselves nor were they unlawful by reason of their methods.

[fol. 21] 8. In view of the foregoing findings and conclusions, a preliminary injunction as prayed is unnecessary and improper and would be improvidently or erroneously

issued within the meaning of Chapter 214 of the General Laws, subsection (2) of Section 9A, as amended by Section 3 of Chapter 452 of the Acts of 1950.

9. In view of the foregoing findings and conclusions, and in view of the fact that the original Bill of Complaint alleged activities (paragraphs 13 and 14) directed only at employers (motor carriers) with whom it was alleged the Respondent Union had a labor dispute (paragraph 17(d)), the temporary restraining order heretofore issued, and continued during the pendency of these proceedings was improvidently or erroneously issued within the meaning of Chapter 214 of the General Laws, subsection (2) of Section 9A, as amended by Section 3 of Chapter 452 of the Acts of 1950.

Respectfully submitted, Stephen J. D'Arcy Jr., Attorney for each and every of the above-named Respondents.

The within Requests for Rulings of Law are denied.
Jesse W. Morton, J.S.C.

IN SUPERIOR COURT OF SUFFOLK COUNTY

RESPONDENTS' EXCEPTIONS TO DENIAL OF REQUEST FOR RULINGS OF LAW

Now come the Respondents, each and every one of them as they are named, and herewith file exceptions to the Honorable Court's denial of their Request for Rulings of Law, heretofore duly filed.

Respectfully submitted, Stephen J. D'Arcy, Jr., Attorney for the Respondents, each and every above-named.

[fols. 22-23] IN SUPERIOR COURT OF SUFFOLK COUNTY

RESPONDENTS' REQUEST FOR APPOINTMENT OF STENOGRAPHER TO REPORT EVIDENCE TO FULL COURT (*Nunc pro tunc*)—Filed December 19, 1952

Now come the respondents, each and every of them and respectfully request, in accordance with the provisions of

G. L. c. 214, section 24, as amended by St. 1947, c. 365, section 1, this Honorable Court to designate Court Report Arthur E. Baker to report the evidence in this cause to the Supreme Judicial Court (Full Court).

It is further requested that this appointment be made nunc pro tunc, effective as of the original dates of trial of this cause, July 24 and 25, 1952, on which dates the said Arthur E. Baker was the Court Reporter who took the said evidence.

Respectfully submitted, Stephen J. D'Arcy Jr., Attorney for the Respondents.

Approved: & Mr. Baker is hereby designated as above
Jesse W. Morton
Dec. 19, 1952. Filed by Leave of Court and allowed. (Morton J.)

[fol. 24] IN THE SUPERIOR COURT OF THE COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. 65809 EQUITY

[Title omitted]

Before Morton, J., Boston, Massachusetts

TRANSCRIPT OF HEARING ON ORDER TO SHOW CAUSE WHY PRELIMINARY INJUNCTION SHOULD NOT BE GRANTED, ETC.

APPEARANCES

Herbert Burstein, Esq., and Edmund J. Moore, Esq., appearing in behalf of the plaintiff.

Stephen J. D'Arcy, Jr., Esq., appearing in behalf of the defendants.

[fol. 25] STATEMENT ON BEHALF OF DEFENDANTS

July 24, 1952.
2:10 p.m.

(Conference at the bench between Court and counsel not taken.)

The Court: All right. I am ready to hear you.

Mr. D'Arcy: We are here, your Honor, in order to show cause as to why the complainants' application for a prelimi-

nary injunction should not be granted and to further show that our demurrer to the bill of complaint should be sustained on two grounds: firstly, that this Court is without jurisdiction to grant the relief sought and was without jurisdiction to grant the temporary restraining order which has already been issued; and, secondly, even if it be admitted that all the facts alleged in the bill of complaint are true, for the purposes only of this application for a preliminary injunction and without so answering for the purposes of a hearing on the merits, the complaint fails to state a cause of action upon which the relief sought can be granted.

By way of preface, your Honor, let me state that the defendants are not interested in litigating these matters with the railroad nor anyone else. The defendants are an organization formed for the purpose of bargaining with employers on behalf of the employees whom it represents. That is all the defendants seek to do in this situation, to bargain with those employers whose employees have duly selected the organization to represent them for the purposes of collective bargaining.

Now, the defendants' contentions as to jurisdiction rest on two theories, your Honor: firstly, the bill of complaint alleges acts and deeds which would constitute a so-called secondary boycott affecting interstate commerce. I call your Honor's attention to the bill of complaint:

"2(a). The plaintiff is engaged in the transportation of general commodities in interstate commerce and is subject to the provisions of the Interstate Commerce Act, Part I (U.S.C. 49 et seq.).

[fol. 26] "(b). The plaintiff is subject to the provisions of the Railway Labor Act (45 U.S.C. Section 151 et seq.).

"7. The plaintiff, in the course of performing its duties as a common carrier by rail, transports semi-trailers on flat cars in interstate commerce. Such service is performed pursuant to tariffs duly filed with the Interstate Commerce Commission.

"10. The plaintiff, since December, 1937, has transported semi-trailers on flat cars in interstate commerce.

"11. The plaintiff has numerous contracts with shippers and motor carriers for the rendition of the afore-described service.

"13. On or about July 11 and 12, 1952, the defendant union and the individual defendants in the vicinity of Yard 5 coerced, compelled and ordered various motor carriers and shippers of freight to divert semi-trailers from Yard 5 and thereby prevent the unloading of said semi-trailers on flat cars in the manner afore-described and interfered with and restrained the transportation of said semi-trailers in interstate commerce.

"14. On or about July 14, the defendant union and the individual defendants ordered and enforced a picket line at the entrance to Yard 5 with the express purpose and design of preventing motor carriers and shippers from entering upon said Yard 5 and thereby prevent the loading of semi-trailers on flat cars for transportation in interstate commerce.

"17(b). Upon information and belief, the defendant union and the individual defendants have been and are engaged in an unlawful secondary boycott.

"18. The complainant has invested substantial sums of money and has employed a large personnel for the purpose of rendering the service of transporting semi-trailers by flat cars in interstate commerce."

[fol. 27] Now, your Honor, all the foregoing paragraphs and sub-paragraphs allege the effect of the facts pertaining to this dispute upon interstate commerce. As a matter of fact, the only activities of the defendants which are alleged appear in Paragraphs 13 and 14, in which the plaintiffs claim that not only the effect, they say, but the purpose of said activities is to interfere with and restrain transportation in interstate commerce. The defendants submit, your Honor, that the activities which the plaintiffs seek to proscribe come within the exclusive jurisdiction and purview of the Labor-Management Relations Act of 1947, the so-called Taft-Hartley Act. This being so, the proper forum for presentation of the plaintiff's cause is the National Labor Relations Board and, subsequently, the Federal Courts upon petition by the National Labor Relations Board. I call the Court's attention to Section 10(a) of the aforementioned Taft-Hartley Act, which reads as follows:

"The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor

practice"—listed in Section 8—"affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise; provided, that the Board is empowered by agreement with any agency of any state or territory to cede to such agency jurisdiction over any cases in any industry"—other than mining, manufacturing, communications, and transportation except where predominantly local in character—"even though such cases may involve labor disputes affecting commerce, unless the provision of the state or territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith."

The complainants allege no agreement between the National Labor Relations Board and any state agency within the meaning of the proviso of said Section 10(a) nor could they, since none exists.

That the complainants' allegations come within the exclusive jurisdiction of the Labor-Management Relations Act of 1947 becomes more apparent here when it is realized that on the very same day that complainants sought and secured the temporary restraining order in this Court, they [fol. 28] had previously sought a similar order before Mr. Justice Wyzanski in the Federal District Court for the Disfrict of Massachusetts. One of the theories alleged in that action, numbered CA-52-805 on the docket of the court, was that the defendants' activities were prescribed as unfair labor practices under the Labor-Management Act of 1947. I have procured, your Honor, a certified copy of Judge Wyzanski's Memorandum of Findings and Rulings and, may it please the Court, I should like to read pertinent provisions at this time:

"This complaint is filed today and seeks a temporary restraining order. From the affidavit of William Q. Keenan filed this day, it appears that counsel for the complainant, in accordance with instructions from the Court, got in touch last night with Edward F. Jenkins, President of Local Union No. 25, and himself a defendant as well as agent of one of the principal defendants here involved. Mr. Keenan

informed Mr. Jenkins that this hearing would be held today." Incidentally, your Honor, I am prepared to show that Mr. Jenkins was not notified of a hearing, as such, but it does not appear material in this proceeding. To go on: "Mr. Jenkins replied after 15 minutes' consideration that 'his union would not be represented' at this hearing. Under Federal Rules of Civil Procedure, a Federal Court, Federal District Court is authorized to proceed ex parte in connection with an application for a temporary restraining order, and I am proceeding in accordance with the authority so conferred.

"The complaint filed here asserts supposed causes of action under the Labor-Management Relations Act of 1947, customarily referred to as the Taft-Hartley Act, and under the Sherman Act as modified by the Clayton Act, customarily referred to as the Anti-Trust Acts. During the course of the argument before me, the plaintiff"—the same plaintiff as before this Court, your Honor— "abandoned so much of its claim as is supposed to rest upon the Taft-Hartley Act. That abandonment seems necessarily to have been well advised since, first, the plaintiff is an interstate railroad carrier not satisfying the definition of an employer under the Taft-Hartley Act; and, second, the type of relief here sought, to wit, an injunction, is, under the terms of the Taft-Hartley Act in connection with the type of tort alleged [fol. 29] to have been inflicted, available only to the National Labor Relations Board or one of its authorized agents, which the plaintiff does not claim to be."

It appears doubtless to the defendants, your Honor, that this plaintiff comes to this Court with unclean hands, having lost in its original chosen forum with the identical allegations concerning an unlawful secondary boycott affecting interstate commerce as are contained in the instant bill of complaint. The defendants ask, your Honor, how many times and in how many places does the activity in this dispute have to be litigated before plaintiffs get to the proper forum, the National Labor Relations Board?.

At this point, I should like to digress for a moment on the question of whether or not this employer, the plaintiffs here, meet the definition of an employer within the meaning of Section 2 of the Taft-Hartley Act. It should

suffice to say that such an issue is one to be raised and decided before the National Labor Relations Board, not before this Court. But if the plaintiffs have doubt, the defendants refer to the only case which to my knowledge has arisen on this point. That case is International Rice Milling Company vs. NLRB, 183 Federal Second 21 (CA5). In that case, the Court of Appeals for the Fifth Circuit reversed and remanded to the National Labor Relations Board its decision that a railroad did not meet the definition of an employer within Section 2 of the Taft-Hartley Act. The United States Supreme Court later reversed the Court of Appeals' decision at 341 United States 665 but on entirely different grounds. As a result of these decisions, there is an outstanding Court of Appeals decision, unreversed on the point, that a railroad does meet the definition of employer within Section 2 of the Taft-Hartley Act.

Now, the defendants should also like to call to the Court's attention a case decided in the Federal District Court for the District of Maine. This decision is Pocahontas Terminal Corporation vs. Portland Building and Construction Trades Council, appearing at 93 Federal Supplement 217. Another citation is 26 Labor Relations Reference Manual 2648. In that case, your Honor, Judge Clifford allowed a petition for removal of a similar complaint to that of the plaintiffs, that is, unlawful secondary boycott; and the Court held that only it had jurisdiction over the cause but [fol. 30] had now power to grant relief except upon petition of the National Labor Relations Board in accordance with the Congressional enactment, the Taft-Hartley Act, which preempted the field of labor relations concerning alleged acts which constitute unfair labor practices under the Act.

The defendants should like also to call to the Court's attention a very recent decision of the United States District Court for the Southern District of California on June 2, 1952. In this case, National Labor Relations Board vs. Capital Service, Incorporated, Judge Westover issued an injunction against an employer, just as this plaintiff here, from proceeding to enforce or seeking to enforce a preliminary injunction secured in the Superior Court of

California on precisely the same unlawful secondary boycott charges as this plaintiff alleges. In that decision, reported at 30 Labor Relations Reference Manual 2283, Judge Westover concluded that the Labor-Management Relations Act vests the National Labor Relations Board and the Federal District Courts to the extent specified in Section 10(l) of the Act with exclusive primary jurisdiction to determine how much of the activity alleged shall be prohibited by injunction. Judge Westover further concluded that the activities alleged, precisely as in this case, were in the field covered by the Labor-Management Relations Act and are therefore preempted and closed to state regulation.

Now, there is also a very recent decision of the National Labor Relations Board entitled, "In the Matter of H. N. Thayer Company and Hervo J. Bourque et al." This case was decided only a few weeks ago in early July and appears at 99 NLRB 165. It also appears at 27 Labor Relations Reference Manual 2133. It involves precisely the same type of relief herein sought, and I should like to read a pertinent portion of the decision beginning on Page 10 thereof:

"On January 31, 1949, Plant 1 and Plant 2 separately petitioned Commonwealth of Massachusetts Courts in Equity at Worcester and at Boston to enjoin the strikes as illegal in purpose and method, alleging that the strikes violated the no-strike clauses of the Council contracts then in effect and involved mass picketing and coercion. One court dismissed the petitions on the ground that the strikes were peacefully conducted; the other granted the requested [fol. 31] injunctions, holding that a union may not legally strike for recognition during the term of contracts valid and binding upon their face, recognizing another union and containing no-strike clauses, and finding further that unlawful acts had been committed 'by reason of the combination of persons.' The union appealed the decisions to the Massachusetts Supreme Judicial Court on the grounds that the controversy was moot, the findings unsupported by the evidence, and the State Court without jurisdiction over the dispute because the companies were subject to the Federal Act. The Court affirmed the decrees, finding that the pendency of the present charges showed that the

controversy was not moot," and, your Honor, those are charges which were pending before the National Labor Relations Board—"that it could not review the trial judge's findings of fact, but that there was no conflict with the Federal Act because 'policing of such conduct is left wholly to the states.'

"The Massachusetts Courts enjoined the picketing on the separable grounds that the strike was for an illegal purpose and was conducted in an illegal manner. The respondent companies contend that these decisions are binding on this Board and require dismissal of the Section 8(a)(3) allegations of the complaint. From the fact that 'Congress designedly left open an area for state control,' in relation to coercive tactics in labor controversies, including illegal methods of striking"—citing International Union UAWA vs. Wisconsin Employment Relations Board, 336 United States 516—"the respondent companies conclude that the federal policy requires accepting state determinations of illegality," citing National Labor Relations Board vs. Fansteel Metallurgical Company, 306 United States 240. "The charging parties and the United Furniture Workers of America construe the decrees as dependent upon the findings that the strikes were for recognition and in contravention of the no-strike clauses in the Council contracts. As the contracts were 'part of a systematized interference with the employees' rights to self-organization, themselves unfair labor practices,' they urge that any state determination of the legality of the strike is irrelevant.

"We hold that in deciding the issues before us in that case, this Federal Board is in no respect bound by the decisions of the Courts of Massachusetts either as to the [fol. 32] legality of the purpose of the strike or the legality of the manner in which the strike was conducted. The Act has preempted the field of peaceful strikes affecting commerce." They cite United Automobile Workers of America vs. O'Brien, 339 United States 454, and Amalgamated Association vs. Wisconsin Employment Relations Board, 340 United States 383. "The objectives of such strikes may be judged under the standard provided by the Federal Act alone, and judgment may be made only by agencies designated by Congress in the statute to make them. Con-

sequently, the State Court had no power to proscribe the present strike on the ground that its objective failed to accord with Massachusetts' labor relations policy. The legislative history of the 1947 amendments to the Act shows that this Board, too, was given regulatory power over the area of non-peaceful means employed in labor controversies. The Board was given this power not only to determine, for example, whether violence on a picket line was of such character as to justify discharge of strikers''—citing 1 Legislative History, 434 at 562-563—"but also for the purpose of deciding whether it coerced or restrained employees in the exercise of their statutory rights and thus constituted an unfair labor practice by a labor organization within the meaning of Section 8(b)(1)(a)," citing 2 Legislative History 1021, 1196, 1207-08. "Plainly, the Board is not bound by a decision as to the objectives of the strike which the State Court had no power to make, nor is it bound by that Court's ruling respecting the character of the means. The Act vests the Board with exclusive primary jurisdiction over all phases of the administration of the Act," citing California Association vs. Building and Construction Trades Council, 178 Federal Second 175 (CA9). "Effectuation of this objective necessarily requires that the Board's conclusions as to whether the purpose or the means of the instant strike illegalize it for purposes of the Act should not turn upon whatever different standards the respective states may see fit to adopt," citing National Labor Relations Board vs. Hearst Publications 322 United States 111, 123.

Since, your Honor, the issues arising in this matter affect the most basic and fundamental law of this Commonwealth and this country in applicability to labor relations, it seems wise to review some of the background pertaining to jurisdiction and injunctions. Prior to 1890, the standard procedure for breaking strikes was the use of the injunction. [fol. 33] But in that year, the Sherman Act was passed and added to labor's burden the possibility of treble damages in Federal Court suits. In 1914, the Clayton Act was passed and was hailed as relieving labor of the oppressive burden of injunction, but this failed when actions were started in the courts. As a result, the Norris LaGuardia Act was passed

In 1932, severely restricting Federal Court jurisdictions to issue injunctions in labor disputes. Throughout this period, there was little dispute as to whether jurisdiction was in State or Federal Courts or agencies. As a matter of fact, working arrangements were made between the National Labor Relations Board and various of the state agencies whereby they agreed on jurisdictional questions.

In 1939, however, Wisconsin passed an Employment Peace Act, and from that time on, the issue of federal-state jurisdiction surged forward with an increasing crescendo. In 1942, the United States Supreme Court decided the case of Allen Bradley Local vs. Wisconsin Employment Relations Board, appearing at 10 Labor Relations Reference Manual 520, and held that state regulation was valid since the state act was not inconsistent with the national act but went beyond it. In 1949, the Supreme Court reaffirmed this principle in the case of Algoma Plywood & Veneer Company vs. Wisconsin Employment Relations Board, 336 United States 301, and appearing also at 23 Labor Relations Reference Manual 2402. In February, 1950, the Supreme Court rendered another decision on this problem, Wisconsin Employment Relations Board vs. Blankington Packing Company, appearing at 338 United States 953 and 24 Labor Relations Reference Manual 2325. Here, however, the Court reversed the Wisconsin Supreme Court, citing its own previous decision in Bethlehem Steel Company vs. New York Labor Relations Board, appearing at 19 Labor Relations Reference Manual, and stating: "The Federal Board has jurisdiction of the industry in which these particular employees are engaged and has asserted control of their labor relations in general. We do not believe this leaves room for the operation of the state authority asserted." The Court also cited its decision in the case of LaCrosse Telephone Company vs. Wisconsin Employment Relations Board, appearing at 335 United States 18 and also at 23 Labor Relations Reference Manual 2236, wherein the State of Wisconsin was ousted of jurisdiction by the United States Supreme Court because of a conflict in the Acts, and the industry was one over which the Na-

[fol. 34] tional Labor Relations Board has consistently exercised jurisdiction.

Since the only activities alleged in the bill of complaint concern employees engaged in the trucking industry in interstate commerce, it seems pertinent to say a word of the fact that the National Labor Relations Board has consistently exercised jurisdiction over their labor relations in general. It seems almost a matter of judicial notice, but in any event, the National Labor Relations Board has exerted jurisdiction over substantially all of the employers, the motor carriers, with whom the dispute exists and has further exerted jurisdiction over the plaintiff's subsidiary, the New England Transportation Company. As a matter of fact, at this very moment, the National Labor Relations Board in investigating the dispute between the defendants and the motor carriers involved in Case Nos. 1-CA-1243 through 1-CA-1262 on the docket of the First Regional Office of the Board. I have copies of these complaints with me, should it please the Court to examine them.

Nor does the foregoing exhaust the jurisdictional issue, your Honor. And I may say at this point, your Honor, I could defer for a moment from the reading of this paper. I think it is going to involve the facts because it is our contention that nothing has occurred in this particular dispute and no activities have occurred which do not constitute speech, clear and simple. If you would sooner, I would hold that in abeyance until such time as evidence may be heard, but I do have a bit more to cover on the matter of preemption of the field.

Now, your Honor, we come to the second theory of the defendants' contention that no preliminary injunction should be granted upon this bill of complaint: that there is no jurisdiction in this Court to grant the relief sought or to have issued the temporary restraining order already issued. That theory rests upon the fact that there is here involved a labor dispute, pure and simple. The Court's attention is invited to Paragraph 17(d) of the plaintiff's bill of complaint, reading as follows:

"Upon information and belief, the defendant union and the individual defendants have been and are now engaged in an unlawful boycott arising out of the labor dispute [fol. 35] between the defendant union and various motor carriers with the object of forcing and requiring the com-

plainant to cease transporting semi-trailers owned and operated by motor carriers and shippers and cease doing business with such motor carriers and shippers."

The Court's attention is also invited to Paragraph 8 of the same bill of complaint, reading as follows:

"Upon information and belief, the defendant union has collective bargaining agreements with numerous motor carriers operating in, through and to the City of Boston, Massachusetts, and that such agreements have been in force and effect for approximately 10 years."

Now, your Honor, the only facts alleged in the bill of complaint are contained in Paragraphs 13 and 14, which paragraphs I have already read. These paragraphs allege activities by the defendants, but nowhere do they allege that these activities were directed against the plaintiff. All the activities alleged in those paragraphs are expressly alleged to have been directed at the motor carriers and shippers with whom the plaintiff has admitted that the defendants have collective bargaining agreements and with whom the plaintiff has admitted that the defendants have a labor dispute. If the foregoing is not deemed by the Court to be sufficient, the defendants offer to prove and will prove that the only activities which in fact occurred involved speech alone and were directed to employees of the motor carriers alone for purposes termed lawful within Chapter 149 of the General Laws, Section 20C as amended by Section 2 of Chapter 452 of the Acts of 1950, the so-called Anti-Injunction Law.

Incidentally, your Honor, the Court's attention is invited to Section 7 of this statute, which reads as follows:

"All acts and parts of acts in conflict with the provisions of this act are hereby repealed and this act shall be construed liberally in aid of its purpose, which is to limit and curtail the use of injunctions in labor disputes."

[fol. 36] If the Court is not yet convinced that there is here involved a labor dispute, I should like to take a moment to read a further provision of Judge Wyzanski's remarks when the instant plaintiff sought the same relief upon substantially the same bill of complaint:

"Upon being asked by the Court what the plaintiff would be prepared to show in the event that evidence were to be

taken, the plaintiff summarized through two separate counsel its statements of what it was prepared to show upon the complaint, and one of the plaintiff's counsel supplemented the statements more [illegible] answering the Court's questions. From all of this material elicited in advance of the taking of any evidence, it appears, so patently as not to be denied, that actually this controversy is one with respect to the allocation of work available. At the present time, the trucking companies located in and about Boston carry to Yard 5 of the plaintiff trailers loaded with merchandise. Parts of the trailers together with *to* merchandise are removed from the trucks and placed directly on the plaintiff's flat cars. In this way, parts of the trailers and the merchandise are transported by rail. In the view of Local 25 and its officers, this deprives those who are engaged in driving trucks of work which they would otherwise receive. The effect of this is in their view to reduce labor opportunities available to them and to transfer such labor opportunities to the railroads and the railroad workers.

"Without in any way subscribing to or criticizing the view taken by Local 25, its officers and agents, the Court rules as a matter of law that this type of controversy is precisely analogous to the problems raised in United States vs. Hutcheson. This is the type of labor controversy not related primarily to production or prices and like cases falling within the normal scope of the Anti-Trust Laws, but it is the type of problem which is essentially a labor dispute."

Now, your Honor, I should like to discuss the Massachusetts law as it pertains to the allegations contained in the plaintiff's bill of complaint.

From the case of Reeves vs. Scott, 324 Mass. 594, it appears that as late as September, 1949, the Massachusetts Supreme Judicial Court has reaffirmed certain basic prin- [fol. 37] ciples of the Massachusetts law as they pertain to activity in labor cases. In that case, the Court stated that employers, as the plaintiff here, have a property right to engage in their business enterprises, citing Goden vs. Nieburh, 236 Mass. 350-351; Saveall v. Demers, 322 Mass. 70-75. The Court also stated that the burden is on the de-

fendants to show justifiable interference lawfully carried out, citing Quinton's Market vs. Patterson, 303 Mass. 315-317; Keegan vs. O'Donnell, 310 Mass. 495 at 500-501. There is not the slightest allegation in this bill of complaint that any of the defendants' activity is unlawful except possibly wherein they allege the conclusion of picketing, a matter I shall hereinafter discuss. The only allegation is that the object is unlawful.

It is also clear from the case of Reeves vs. Scott that members of a union have the right to compel their employers to give them all available work of the particular kind which they are competent to perform, even to the exclusion of others, where the Supreme Judicial Court cited Pickett vs. Walsh, 192 Mass. 572; Hoban vs. Dempsey, 217 Mass. 166; Tracey vs. Osborne, 226 Mass. 25; and Shinsky vs. O'Neil, 232 Mass. 99. The Court's attention is again invited to Mr. Justice Wyzanski's Memorandum of Findings and Rulings wherein he found such to be the object of these very defendants upon the complaint of these very plaintiffs. If the defendants have the right to strike for said object, they must certainly have the right to bargain concerning it, and the Court's attention is invited to Section 7 of the so-called Taft-Hartley Law, reading as follows:

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection," and so forth. The rest of the section is not applicable in this proceeding. The Court's attention is also invited to Section 8(a)(5) of the same Act, reading as follows:

"8(a). It shall be an unfair labor practice for an employer (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a)," which provisions are not here material. [fol. 38] It is this very matter which the National Labor Relations Board is now investigating.

The Court's attention is also invited to Chapter 150A of the General Laws, Section 4, Subsection (5), reading as follows:

"4. It shall be an unfair labor practice for an employer (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Subsection (a) of Section 5," not here material.

We again refer to Paragraphs 13 and 14 of the bill of complaint, the only paragraphs in which any activities by the defendants are alleged, and it will be noted that those very paragraphs state that all such activities were directed to the motor carriers with whom it is admitted that the defendants have collective bargaining agreements.

Now, we recognize that a secondary boycott is unlawful in Massachusetts. The Supreme Judicial Court so hold in the same case of Reeves vs. Scott and cited many cases, citations of which I can afford the Court, if desired.

Now, your Honor, I previously stated that I would discuss the only possible allegation of unlawful activity by the defendants, the allegation of the conclusion of picketing in Paragraph 14 of the bill of complaint. The Court's attention is invited to the following language appearing in the Supreme Judicial Court's opinion in Fashioncraft, Incorporated vs. Halpern, 313 at 385-90: "Picketing, however, may be more than a means for making public the facts of a labor dispute. The presence of persons, patrolling along the highway abutting the employer's premises; marching back and forth in more or less close formation; obstructing passage to those entering or leaving the premises; impeding free and uninterrupted travel along the public way, when considered with the number of persons participating and the character of their demeanor, may be sufficient to induce breaches of the peace and other infractions of the law designed to preserve the safety and security of society. Such a situation may arise irrespective of the nature of the information conveyed by the pickets. Although picket [fol. 39] ing may be affiliated with free speech, a state is not required to tolerate picketing of all types and may regulate and restrict it in order to avert some definite substantial danger clearly arising from the methods adopted

by the pickets," citing Milk Wagon Drivers Union of Chicago, Local 753 vs. Meadowmoor Dairies, Incorporated, 312 United States 287; Hotel and Restaurant Employees International Alliance, Local 122 vs. Wisconsin Employment Relations Board, 315 United States 437; Carpenters vs. Ritter's Cafe, 315 United States 722; Allen-Bradley, Local 1111 vs. Wisconsin Employment Relations Board, 315 United States 740.

The defendants submit, your Honor, that the bill of complaint is absolutely devoid of any allegation of any of the activity which the Supreme Judicial Court states may be regulated or restricted. As a matter of fact, they could not so allege because the facts show or will show that the pure and simple activity of the defendants was speech and speech alone—no placards, no arm bands, no threats—and was directed only to employees of the motor carriers with whom the defendants seek to bargain and with whom they have contracts. No other motor carrier employees were as much as spoken to. No activity has been directed at the plaintiffs or any of their employees. We submit that such activity is protected under the Constitution of the Commonwealth of Massachusetts and the Constitution of the United States.

Now, the foregoing leads us to the restraining order which has already been issued, your Honor, and we request that this Court rule as a matter of law that the restraining order was issued improvidently or erroneously within the meaning of Chapter 214 of the General Laws, Section 9(a) as amended by the Acts of 1950, Chapter 452, Section 6, Subsection (2), the so-called State Anti-Injunction Law.

It is submitted that the record is barren of any attempts by the plaintiff to comply with the provisions of those amendments. It is further submitted, your Honor, that the defendants have been counseled to meticulously obey the extreme breadth and width of the restraining order, lest even a discussion of the matter between themselves and a member might be construed as a "wink or a nod" within the decision of Mr. Justice Goldsborough in the United Mine Workers contempt case, and subject the instant de- [fol. 40] fendants to a contempt citation. To the best of my knowledge and belief, the restraining order has been so

obeyed. The restraining order has forbidden us from attempting to bargain with the motor carriers as the representatives of their employees, in violation of state and federal law. It has restrained the defendants from advising employees of the various motor carriers involved that they had a right to refuse to drive trucks which were overweight under the laws of the Commonwealth, whereby they would became trespassers upon the highways. It has restrained the defendants from attempting to enforce Article VII of their agreement with the various motor carriers involved, which article reads as follows:

"It is agreed that employers will not engage other equipment while they have available equipment of their own. When necessary to hire equipment, it is agreed that in order to assist in giving employment to members of Local 25 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and/or to reduce the idle equipment burden of those employers signatory hereto, that such employers shall hire said equipment as follows: from employers likewise signatory to this agreement when such employers are able to furnish said equipment."

The defendants submit, your Honor, that they have shown cause on a jurisdictional basis as to why this preliminary injunction should not be granted and also request a ruling, your Honor, as a matter of law, that the restraining order already issued was issued erroneously or improvidently within the meaning of the State Anti-Injunction Law.

The Court: All right. We'll take a short recess.

(Short recess.)

The Court: All right, gentlemen.

STATEMENT ON BEHALF OF PLAINTIFF

Mr. Burstein: May it please the Court, if my brother's argument is well taken and if it is sound, then the objections asserted to the original claim will lie as well to the amended bill. If in fact there is no jurisdiction in this Court, then

this Court can no more entertain the cause of action alleged in the amended bill than in the original bill.

[fol. 41] As I understand the argument made by my brother, it divides itself into two parts. He says, first, this Court does not have jurisdiction of the cause of action because jurisdiction is reserved exclusively to the National Labor Relations Board under the Taft-Hartley Act. He then asks this Court to find as a matter of law that there is a labor dispute and, accordingly, this Court may not grant a temporary restraining order without a preliminary hearing as required by Section 9(a).

I should like to address myself first to the question of the jurisdiction of this Court because I think it is fundamental. It is in fact the seminal issue here. There was a complaint in the Federal District Court and two causes of action were started. Under the first cause of action, the plaintiff alleged the commission of an unfair labor practice and sought damages under Section 303A of the Taft-Hartley Law, which says that it is an unfair labor practice or it is unlawful for a union to engage in a strike for the purpose of compelling an employer to assign specific work to another craft. Mr. Judge Wyzanski said, very properly, "There is no jurisdiction in the Federal Court to hear that claim because under the express language of the Taft-Hartley Act, specifically, Section 2(2), a railroad is not an employer." But before Mr. Judge Wyzanski made that comment, I withdrew the complaint or that portion of the complaint as asserted a cause of action under the Taft-Hartley Law, and I respectfully call your Honor's attention to the express language of the National Labor Relations Act as amended in 1947. Section 2 deals with definitions and it says: The term employer includes any person acting as an agent of the employer directly or indirectly but shall not include the United States or a wholly owned government corporation or any Federal Reserve Bank or any wholly owned government corporation or political subdivision or any corporation or association operating a hospital or any person subject to the Railway Labor Act. My brother concedes that the railroad is subject to the Railway Labor Act, and there is precedent not only before the Board but in state courts that the railroad cannot assert a cause of action under the Taft-Hartley Law.

Now, my friend relies upon a decision by the National Labor Relations Board in the Thayer Case, and I should like to give your Honor the facts. Thayer is a manu- [fol. 42] facturer or a storekeeper, as I recall now, who operates a store in Massachusetts. He had a contract which contained a no-strike clause. Certain employees went on strike and he discharged them. They proceeded to picket, and he went into the Superior Court and asked for and received an injunction; whereupon the union filed a charge of an unfair labor practice with the National Labor Relations Board. And the National Labor Relations Board, an agency of the United States Government, presumes to say to the courts of this state: you have no jurisdiction because if there is interstate commerce and if there is picketing and if there is a strike, we have exclusive jurisdiction. Now, that isn't a law in this state.

The State of Massachusetts has consistently held that under the police power of this state, it can regulate picketing, it can regulate strikes, and it has granted injunctions against violence, against mass coercion, against the demand for the unlawful closed shop, for example, or in cases where there have been sympathetic strikes, and, more important, where a union by coercing a neutral third party attempts to foreclose an employer from using labor-saving devices. And there are a line of authorities on that score. Massachusetts stands with a variety of other states, Louisiana, Missouri, Michigan, and the State of New York, in stating that the police powers of the state authorize the courts of this state to grant injunctions in aid of the regulation of the manner in which picketing and strikes are conducted.

Yes, the National Labor Relations Board is attempting to test that principle, but as the law now stands in this state under the Thayer case, the power to regulate picketing and strikes is reserved exclusively to this Court. And so it seems to me that the argument is academic. This Court will not surrender its powers to an administrative agency of the federal government. Indeed, the whole question is clouded in obscurity, and I should like to state very simply the governing principles.

Hear what some of the courts have said: "Where there

is a claim of an unfair labor practice or some act on the part of a union, and if that act is either sanctioned or forbidden by the Labor Management Relations Act, the remedy lies exclusively in the National Labor Relations Board." Now, that isn't a law in this state but it is a law [fol. 43] in some states and some Federal Courts have so held. On the other hand, if there is an area which is not preempted by the federal government, then the state court is free to act.

Now, this is a case which does not involve a secondary boycott under Section 8(b)(4)(d) of the National Labor Relations Act. It involves an unlawful secondary boycott, if at all, if there is a labor dispute under the applicable provisions of the Massachusetts law. Consequently, even if the Board were correct in its assertions and contentions —and we submit it is not because this Court, the Superior Court has said it is not—then there is an area concededly reserved to the states under the decisions of various Federal Courts, including the United States Supreme Court in the International Rice Milling Case. And I should like to tell you about that case. That case was cited by my friend for the proposition that the railroad could go to the Board and ask for relief. In that connection, I might add that Mr. Judge Wyzanski pointed out that we might have a remedy in the state court. He merely said, "You are an employer but not the kind of an employer who can go into the Federal Court under the Taft-Hartley Law." Indeed, he said, "If you were such an employer and if you have a dispute, then you are obliged to proceed before the National Labor Relations Board."

And then there was a second cause of action. We alleged that there was a conspiracy in restraint of commerce under the Sherman Act, and Judge Wyzanski properly said that under the United States against Hutcheson, an injunction may not be granted by a Federal Court where there is a claim of violation of the Sherman Act. And that's all the decision said, and he dismissed it without prejudice to a proper pleading and without prejudice to our appearing before the state court. When we appeared before Judge Swift, we pointed out the dismissal, because the dismissal was exclusively on the ground that the Federal Court did not have jurisdiction; and that was correct because it could

not hear our case under the Taft-Hartley Act—we are not employers—and it couldn't hear it under the Sherman Act because of the governing principle of the United States against Hutcheson.

Now, on the International Rice Milling Company Case, the Circuit Court held that by reason of the vague and [fol. 44] ambiguous language of Section 8(b)(4)(d), which speaks of any employer, a railroad might in a proper case, where there was a secondary boycott—for example, A, an employer, does business with B, a neutral party. C, a labor union, proceeds to picket the neutral employer to induce his employees to go on strike with the view and object of forcing A to come to terms with the union. And the Circuit Court said that in that kind of a case, a railroad might be an employer; but the United States Supreme Court reversed, and there is no governing law. There is not a single case in the Federal Courts which holds that a railroad may proceed before the National Labor Relations Board. And even if that were so, and it is not, the courts of this state have plainly held that the regulation of picketing and strikes is reserved exclusively to the state, and that was the ruling in the Thayer Case and in one other case.

We have alleged here that the plaintiff operates a business. We have alleged that a union has caused or enforced a picket line to be established at its entrance with the result that the plaintiff has been unable to fulfill its contracts, that the plaintiff will suffer irreparable harm and injury, that the plaintiff has a substantial investment which will be lost. The courts of this state have repeatedly held that a tortious interference with the right to conduct business properly may be enjoined.

Now, in asserting that all we have here is a question of speech, my brother forgets a recent line of cases by the United States Supreme Court—Geboney vs. Empire Ice & Coal, United States Teamsters vs. Hanke, Building Service Employees vs. Gazzam—in which the United States Supreme Court said that, notwithstanding the decision of Thornhill vs. Alabama, which equated free speech with picketing, the state may establish a public policy and if picketing violates a public policy, that picketing may be enjoined by a state court; so that the field of regulation

and picketing and strikes is not preempted by the Federal Court. On the contrary, the United States Supreme Court has expressly held that picketing and strikes which are contrary to the public policy of the state may be enjoined by the state court, and this Court not only has enjoined such strikes but has power and authority to do so.

Of course, we allege damage. We say that there has been damage. There is picketing which prevents our company [fol. 45] from conducting its usual and ordinary business affairs. And Pickett vs. Walsh is no objection because we have a variety of other cases, for example, Armstrong Cork and Insulation vs. Walsh, New England Cement Gun Company vs. McGowan, the recent case of McHugh in this state in which it was held that merely because a labor union is involved does not per se clothe illegal activities with amnesty of the Anti-Injunction Law. So the fundamental question, the question that must be resolved is: is there a labor dispute? Now, we say, your Honor, that can't be decided as a matter of law. You must adduce testimony. We have abandoned our claim, a claim asserted in our original pleading, that there is no labor dispute because a labor dispute is clearly defined in the statutes of this state. And let's look at that statute. Chapter 149, Section 20C, Subsection (c), defines a labor dispute as "any controversy arising out of a demand related to the terms and conditions of employment; (b) the association and representation of employees for the purpose of negotiating, fixing, amending, altering a contract of the terms and conditions of employment." And, therefore, a labor dispute has a two-fold aspect. One is recognition. And the law says that if there is a dispute involving a claim of representation or recognition, that is a labor dispute. If its objectives are no good, it is an unlawful labor dispute and may be enjoined. And, secondly, the law says that there may be a labor dispute where there is a controversy arising out of a demand related to the terms and conditions of employment. Now, the basic question here is: is there a controversy arising out of a demand related to the terms and conditions of employment? We respectfully submit that there is no such controversy because there couldn't be such a controversy. Why is that so? The union has not made a demand upon any employ-

ers. There is no claim that there is a demand made upon motor carriers to change the terms and conditions of employment.

Oh, yes, my friend filed a charge of an unfair labor practice with the National Labor Relations Board. Anybody can do that. The test is: will the Board issue a complaint? And no complaint has been issued. And what do they say in the charge? They say: the employer doesn't want to bargain with us about the terms and conditions of employment. To begin with, that charge is made after the proscribed picketing is carried on and, more important, my [fol. 46] brother forgets the governing principles of Jacobs vs. National Labor Relations Board, in which the Board says: "Where parties to a collective bargaining agreement are negotiating a collective bargaining agreement, and if they discuss a subject and if that subject is not covered by the collective bargaining agreement, that contract may not be reopened during the life of the agreement." Now, how does that principle apply here? In short, where the parties to a contractual labor arrangement have carried on negotiations and they have discussed a given subject and the agreement is made and there is no reference to that subject, the Board has said that is not bargainable and you can't have a labor dispute. Now, we can't prove to your Honor as a matter of law that there is no bargainable issue here, but we can prove as a matter of fact on a trial that these issues, the very issues which are the subject of the charge, the subject matter of the charge, were the matters which were the subject of the collective bargaining on repeated occasions and that the current contract makes no reference to this demand.

What did the union do here? Did it make a demand on the employers? No, because the union was too well advised. The union knows what the Jacobs Case stands for, and so they enforced a boycott against the railroad in an effort to put the heat on the railroad and to force the employers, the motor carriers, to unilaterally change their contract during the life of that contract. We don't claim that they started a strike among our employees, and they say they have got no dispute with us. All they want to do is to stop us from doing business, and they say that that's lawful

because they have a right under the doctrine of free speech to damage a man and his business and his property, and we submit that has never been the law. It is not now the law, and I do not believe that a single court of this land, and certainly of this state, would establish such a principle.

If there is one principle which is clear and clearly established in this state, a strike or picketing to force an employer to turn over work to an employee, which work has been contracted out to other persons, is unlawful and may be enjoined. Now, if a union such as this union can picket a neutral third party with the objective of putting the heat on that party, preventing that party from doing business, so that motor carrier companies may be enabled to carry on the transportation which the railroads carry on, then we establish not a rule of law but a principle of the jungle, [fol. 47] and I'll tell your Honor why. The railroad employees can turn around to the motor carrier and say: you stole our business. After all, all the business that the motor carriers handle now originally was handled by the railroad. And what a fine situation it would be in this state and in every other state if railroad employees would set up picket lines in front of every motor carrier.

Now, what have we got here? We have nothing more than a plain and simple tortious interference with the operation of a railroad's business. We have here an illegal attempt to forbid the institution of either labor-saving devices or progressive changes in transportation. Now, there is plenty of authority which holds that where a union attempts not only to control the manner in which work is done but to restrict the introduction of labor-saving devices to subvert technological improvement, there is no labor dispute. And there is a case on that in Opera on Tour vs. Webber, which appears in the New York Reports, Volume 285. That principle has been adopted and affirmed and reaffirmed by the courts of this state in the case of Armstrong Cork vs. Walsh and New England Cement Gun Company vs. McGowan.

Now, briefly, your Honor—and your Honor has been most patient; you have heard a lot of long argument, and I hope I haven't been too enthusiastic myself—now, briefly, what is the problem here? We have set up a complaint, our

original complaint, and we say: We operate a railroad. A union came along and started picketing us. As a result, we are obliged to breach our contracts of carriage. We are obliged to fulfill them or we cannot fulfill our obligations of carriers under the Interstate Commerce Commission Act. We have a substantial investment which is lost. We have special equipment which cannot be adapted to anything else. We have damages which are not compensable in an action at law. Nobody has a quarrel with the railroad. Everybody likes John, but everybody is beating John. We are John in this case. The union can't change its contracts, and, indeed, if the union wanted relief, my brother knows that there is an arbitration provision in that contract so they could have resorted to arbitration. They could have said: Gentlemen, this issue is arbitrable. We are entitled to move those trailers, and if you deny us that right, we will use the contractually defined grievance procedure. But they don't do that because they can't succeed because that [fol. 48] issue is resolved. So what do they do? They set up the picket line.

Now, in our amended complaint, this is what we did. We said we don't abandon our original complaint. There is no labor dispute. There is no argument about recognition. The union doesn't say there is an argument about recognition. There is no argument about the terms and conditions of employment because there is a collective bargaining agreement. But we say if this Court should find that there is a labor dispute, then we don't want to be out of court. We don't want to file a new paper. We don't want to burden the Court with redundant and cumulative evidence, and we say we want you to hear it and we want to put witnesses on the stand. And your Honor might conclude there is no labor dispute, and indeed, in a recent case, the Superior Court heard evidence and said: "We have concluded that there is no labor dispute but, nevertheless, to make certain that there can be no reinstitution of the picketing, we will make all of the findings under 9(a)." That was the case of Thayer vs. Binnal. And guided by that case, we come to the Court and say: Your Honor, we haven't got a labor dispute but maybe it is; and if it is, it is unlawful, and if it is unlawful, then it is an illegal secondary boycott as defined under

our statute, not the National Labor Relations Board because we have no business with that Board. And in the interest of judicial husbandry, to expedite the decision of this very important matter, we ask the Court to hear the case. We have our witnesses here. We haven't delayed. We have come within the ten days. We have submitted an amended complaint and we have asked to have it heard.

Now, your Honor, since your Honor has indicated that sometime in the course of the matter the application for leave to file the amended complaint will be granted, because the courts are liberal in this state on such applications, we precisely submit that our application should be now granted. And if indeed my brother's argument about jurisdiction is sound—and I most respectfully say it is not sound, although I do want to acknowledge a very able presentation of his point of view—but if it is sound and we have no standing in this court, we might just as well know it today. There is no point in pleading our cause of action under the original complaint and then being thrown out of court on the ground, [fol. 49] that the jurisdiction is reserved to the Board and then come forward with an amended complaint.

Finally, your Honor, we say that the public policy of the State of Massachusetts encourages the peaceful resolution of labor disputes. We say there is no legitimate labor dispute here. There is no labor dispute here, and all that the union is attempting to do by this picketing, these picket lines, is to divert the trailers to make it hot for the railroads and to force the motor carriers to do indirectly what the union cannot accomplish directly. And for that reason, we ask the equitable intervention of the Court.

The Court: All right. Are either of you going to submit memorandum?

Mr. D'Arcy: I will give you a copy of the statement I have prepared.

The Court: If you have anything, I will take it.

Rebuttal on Behalf of Defendants

Mr. D'Arcy: I should like to make a few remarks, your Honor, on what my colleague has said.

He stated that if I am right in my contention that the National Labor Relations Act has preempted the field in this

particular matter, it goes to both the original bill and the substituted bill. To that extent I agree. There is a second point upon which the defendants contend that this Court has no jurisdiction to grant the application for the preliminary injunction upon the original bill. We also contend there was no jurisdiction to have granted the temporary restraining order. I call your Honor's attention to a sub paragraph in Paragraph 17, in which the plaintiff alleges there was a labor dispute in the original bill. Then they secured a temporary restraining order which was good for ten days, in violation of the statute and without any attempt to comply with the provisions of the statute as far as notice or as far as posting adequate surety for any damages that may result in accordance with that amendment. They did in no way intend to comply with it nor have they done it in connection with the substituted bill. [fol. 50] There is nothing in the report to show they have complied at all. On that point, your Honor, we think that the question of the term "labor dispute" still goes to the original bill, and we beg your Honor leave for another hearing on the substituted bill.

As to my colleague's argument that there was no jurisdiction in the Federal Court on his original petition, he is now here claiming that he wants to put a stop to running places. Why didn't he come here in the first place instead of going to the Federal Court for his injunction? He states he has no adequate remedy at law. If what he states is true, he can sue us for treble damages under the Sherman Act.

I also submit, your Honor, that the question of whether or not the railroad is an employer within the meaning of the Taft-Hartley Law was neither before Judge Wyzanski nor was it before this Court. That is properly before the National Labor Relations Board as the court in the first instance in that issue. Even in the amended bill of complaint, your Honor, in Paragraphs 12(c) and 14(b), my brother alleges specifically that the defendants have violated the National Labor Relations Act. We ask: when is he going to get to that forum?

On the International Rice Milling Case, we submit, your Honor, that the case was reversed by the Supreme Court. There was a very short decision in that case, your Honor,

in which the Supreme Court made no mention of the definition of railroad within the meaning of Section 2 of the Taft-Hartley Law; and the Court of Appeals' decision still stands that the railroad is such an employer. I don't think there is any need to poll the courts of the various states in this country to find which way Massachusetts is going to go. They obviously will stand on their own.

As to the allegation of the original bill against the substituted bill, we again submit, your Honor, that the plaintiffs allege a labor dispute in the first instance, and we reiterate our request for a ruling as a matter of law that the original temporary restraining order was issued improvidently or erroneously within the terms of the Anti-Injunction Law.

The Court: All right. Anything further to be said today? [fol. 51] Mr. Burstein: Your Honor, are you proposing now to adjourn? We have a number of witnesses here ——

The Court: Oh, no. If you want to put evidence on, I will hear it.

Mr. Burstein: Well, I thought your Honor was going to reserve judgment on this application. I didn't know precisely what to do at this point. We have, of course, our original motion here to amend the original bill of complaint and I thought your Honor was going to defer judgment or, if you were going to arrive at a judgment, we would have an opportunity to put our witnesses on the stand. We have a great number of them here and we are prepared to go forward at your Honor's convenience.

The Court: In support of the allegation of your bill?

Mr. Burstein: Yes, your Honor.

The Court: I think I can dispose of these motions, the motion to amend and the motion for an injunction without hearing any evidence. If you don't think so, I will hear it from either side.

Mr. Burstein: Well, might I just say this, your Honor, that if there is no labor dispute, then your Honor can proceed on the basis of arguments which we make and perhaps the testimony of one or two witnesses, because Section 9 expressly provides that. On the other hand, if your Honor should find or if you should entertain any question as to whether or not there is a labor dispute, then it seems to

me that Section 9(a) prescribes then that we must adduce testimony and forward our defendants the opportunity for cross examination.

The Court: If you have got the evidence, I will hear it today and tomorrow and Monday.

Mr. Burstein: Any time your Honor says.

The Court: Go on now.

[fol. 52] Mr. Burstein: We have a good number of witnesses.

The Court: I will hear them all day tomorrow. I am here to hear these things.

Mr. Burstein: If your Honor would like us to start now, we will be glad to do that.

The Court: Bring up the witnesses and have them sworn.

Mr. Burstein: I should like now to call Mr. Daniel Sundel.

DANIEL S. SUNDEL, Sworn.

Direct examination.

By Mr. Burstein:

Q. Mr. Sundel, will you please state your full name and home address?

A. Daniel S. Sundel, 503 Washington Street, Brookline, Massachusetts.

Q. What position do you hold with the plaintiff, New York, New Haven and Hartford Railroad?

A. Manager of sales and services in charge of trailers on flat cars.

Q. How long have you been employed by the New Haven Railroad?

A. Thirty-five years.

Q. And how long have you held your present position as manager of the trailer-on-flat-car service?

A. Since March, 1947.

Q. Will you tell the Court in some detail the nature and character of the service which you call trailer-on-flat-car service, what it consists of and how it is conducted and any incidents thereto?

A. The trailer-on-flat-car service is a mode of transportation involving semi-trailers loaded or empty, transported via flat car on the railroad, requiring special equipment for

the semi-trailer and also a specially designed and exclusively constructed flat car for that purpose, both units having attachments which make it possible to tie down the semi-trailer on the flat car to assure safe and swift transportation. [fol. 53] Q. Are bills of lading issued in advance of the performance of the service or receipts issued at the conclusion of the service?

A. When the semi-trailer is tendered for shipment, a shipper's bill of lading is issued and signed for by the agent's representative. At the termination of the so-called contract in the bill of lading, which constitutes the transportation of the vehicle to its destination, a delivery receipt is issued and that in turn is signed for by the consignee.

Q. Would you briefly describe your duties as manager of this particular specialized service?

A. In addition to my responsibilities involving an overall administrative type of work, I am the contact representative between the railroad and the users of trailers on flat cars.

Q. Do you also supervise the maintenance of records in connection with service?

A. I do, sir.

Q. Now, will you please state what classes of persons use the trailer-on-flat-car service?

A. In a sense, the general public, but breaking it down so that we can identify it, shippers and motor carriers.

Q. Yes.

A. The operation is available to all.

Q. Would it be correct to state that either shippers or motor carriers bring trailers to Yard No. 5 of the New Haven Railroad where the trailer is disengaged and loaded on to a flat car for transportation to some point of destination?

A. That is correct.

Q. Would that be correct?

A. That is correct, sir.

Q. Now, to your knowledge, does the railroad publish a tariff of rates and charges and is that tariff filed with the United States Interstate Commerce Commission?

A. That is right.

Q. Now, I show you a document consisting of three sheets and I ask you if this is the tariff of rates and charges published by the railroad covering the particular specialized service described by you.

A. That is right.

Mr. Burstein: I respectfully offer it.

[fol. 54] Mr. D'Arcy: No objection.

(Tariff rates published by the plaintiff, consisting of 3 sheets, marked Plaintiff's Exhibit No. 1.)

Q. Mr. Sundel, does Plaintiff's Exhibit No. 1 govern the charges which are made for the trailer-on-flat-car service?

A. Correct.

Q. To the best of your knowledge, when was this specialized service instituted?

A. December, 1937.

Q. And it has been continued continuously since?

A. That is correct, sir.

Q. Now, after the tractors bring the trailers into Yard No. 5 and the trailers are loaded on the flat cars, which employees handle the trailers?

A. They are the employees of the mechanical department.

Q. Are they employees of the railroad company?

A. Yes, sir.

Q. And what title or what job classification is given to them?

A. Why, they are classified as car inspectors and helpers.

Q. Are these employees represented by any union?

A. They are, sir.

Q. What union is that?

A. Bay State Lodge 1019 of the Brotherhood of Railroad Carmen of America.

Q. To the best of your knowledge, Mr. Sundel, at any time since the institution of this service, has the railroad had any dispute with the Railroad Carmen of America, Bay State Lodge 1019, respecting this trailer-on-flat-car service?

A. No, sir.

Q. Mr. Sundel, do you know who the defendant Local 25 is or who the membership are?

A. I know of them.

Q. They are a teamster local in Boston, Massachusetts?

A. Yes, sir.

[fol. 55] Q. Now, at any time since the institution of this service, to your knowledge, has there ever been a dispute between the railroad or any of its employees on the one hand and Local 25 and or its members on the other?

A. No, sir.

Q. To your knowledge, Mr. Sundel, on or about July 11, July 12, or July 14, did the railroad or any of its employees have any dispute or controversy with any employer or groups of employers concerning the loading of trailers on flat cars?

A. No, sir.

Q. To your knowledge, Mr. Sundel, before and on July 11 or July 12 and July 14, have any of the employees of the railroad engaged in this trailer-on-flat-car service had any dispute or controversy with any employer or groups of employers or groups of employees concerning this specialized service?

A. No, sir.

Q. Are you familiar with the records of tonnage handled by the railroad in the course of operation of the trailer-on-flat-car service?

A. I am, on the trailer volume.

Q. Are these records maintained in the usual course of business?

A. They are, sir.

Q. And are the entries made in the usual and regular course of the railroad's business?

A. That is correct.

Q. And are these records maintained under your supervision?

A. That is correct.

Q. Have you examined the entries made in the records of the plaintiff corporation as to the volume of traffic or the number of trailers handled by the railroad in the year 1951?

A. I have.

Q. And can you state to this Court what was the total number of trailers handled on flat cars in the year 1951?

A. That total was 22,894 trailers.

Q. And can you state what was the total annual dollar revenue?

A. The gross revenue, $880,000.

[fol. 56] Q. Now, Mr. Sundel, in a general way, you are familiar with the balance of the freight and passenger traffic handled by the New Haven Railroad, isn't that so?

A. That is correct, sir.

Q. Can you state approximately what percentage of the total freight and passenger traffic is constituted by the trailer-on-flat-car service?

A. Let me ask a question: you want the relationship between the trailer volume as to the total freight——

Q. —handled by the New Haven Railroad.

A. I am in a position to tell you that, for example, $91,000,000-odd in freight revenue was obtained in 1951. That is in round figures. Of course, I have just quoted the figure of $880,000 as representing the total gross revenue on trailers. Approximately .95 per cent is the figure that the trailer volume represents to the total.

Q. Now, returning to the specialized service, can you tell us whether or not records are maintained showing the number of trailers which are loaded daily on flat cars?

A. Records are maintained at all trailer installing points and, of course, including Boston.

Q. And are all trailers loaded at Yard No. 5?

A. All semi-trailers on flat cars in this service are.

Q. Mr. Sundel, is the trailer-on-flat-car service restricted to the Boston area or does the railroad carry on and perform such service in other points in the United States?

A. The service is wholly on the New Haven Railroad and conducted at five important shipping center points. I will name those if you like.

Q. Yes.

A. I will put it this way: between Boston and New York, between Providence and New York, between Boston and New Haven, and between Springfield and New York, and at times from New Haven to New York.

Q. And is the operation of the trailer-on-flat-car service out of the Boston station integrated with the operation of

the trailer-on-flat car service at other points which you have mentioned?

A. Definitely so. It is an interdependent operation. It is an integrated system.

[fol. 57] Q. Do you have any record in court which would indicate the average number of trailers loaded on flat cars daily when there are no interruptions such as the kind which the company had on July 11, 12, and 14?

A. Yes, I have.

Q. Do you have any records for the month of, let's say, May or June or July?

A. I have before me a record of shipments made from Boston, that is, shipments of trailers on flat cars during the month of May, the daily average being 34 trailers per day.

Q. And that would be what way, Mr. Sundel?

A. That is from Boston to New York or New Haven.

Q. And how many trailers back from New York to Boston?

A. Well, the number would be in excess of that, but I don't have that information before me.

Q. Would it be fair to say that you have an average of 50 trailers moving in both directions on a usual and normal day?

A. In excess of that.

Q. In excess of 50?

A. Yes, sir.

Q. Now, do you have records which indicate the number of trailers loaded on flat cars on July 11, 1952, out of Yard No. 5?

A. Yes, sir.

Q. You are aware, are you not, Mr. Sundel, that on July 11, 1952, the defendant union through its representatives diverted certain trailers and prevented their entering into Yard No. 5?

Mr. D'Arcy: Objection.

The Court: What's the objection?

Mr. D'Arcy: Those are conclusions he is asking the witness to state.

[fol. 58] The Court: I will hear it. Go ahead.

The Witness: I am aware of it.

Q. Will you tell the Court what happened, to the best of your knowledge, on July 11, July 12, and July 14 of 1952?

A. Being responsible for this operation, I was notified immediately of some interruption at 5 Yard and I immediately proceeded to 5 Yard.

Q. All right. And what did you learn and what did you observe?

A. I was not within hearing distance, but I observed certain people, who I was told were members of Local 25, apparently turning back trailers from entering the yard area.

Q. And preventing the loading of the trailers on flat car?

A. And in addition to that, the prevention of loading of trailers. That is the observation I made personally.

Q. Now, Mr. Sundel, on July 12, did you observe the same thing?

A. I did, sir, and again on the 14th.

Q. But on July 14, you also observed, did you not, a picket line established in front of the yard?

A. You are correct, yes, sir.

Mr. D'Arcy: Objection. Well, too late. He answered, I guess.

Q. Now, Mr. Sundel, you testified that the average number of trailers which are loaded on flat cars out of Boston in a normal day when there are no interruptions such as you described is 34. Now, will you tell the Court how many trailers were loaded on flat cars on July 11, 1952, out of Boston?

A. Two trailers.

Q. And will you tell the Court how many trailers were loaded on flat cars out of Boston on July 12, 1952?

A. None.

Q. Were there trailers available for loading on that date?

A. There were, sir.

[fol. 59] Q. Did shippers to your knowledge send trailers to the yard?

A. Yes, sir.

Q. To your knowledge, did motor carriers send trailers to the yard?

A. That is correct, sir.

Q. Did you have any conversation with any representatives of Local 25?

A. No, sir.

Q. Were you advised that Local 25 had any grievance with the railroad?

A. None to my knowledge.

Q. Were you advised that they had any dispute with the railroad?

A. No, sir.

Q. Did you receive any communication of any kind from any employee or any representative of an employee that there was a grievance or a dispute or a claim or a demand by Local 25?

A. No, sir.

Q. Did you have any claim or demand by any motor carrier?

A. No, sir.

Q. Now, on July 14, 1952, how many trailers were loaded on flat cars?

A. Eight trailers were loaded.

Q. Eight trailers, did you say?

A. Eight trailers.

Q. Now, can you tell the Court what was the total revenue received by the railroad on July 11 by reason of the trailer-on-flat-car service performed that day?

A. May I ask this question: are you referring to Boston?

Q. That is correct, sir, Boston.

A. Yes, of course. In dollars and cents, if there were no interruptions——

Mr. D'Arcy: Objection.

Q. No, sir, what you actually received on that day.

A. Actually, $77.35.

[fol. 60] Q. And will you tell the Court what is your normal revenue on a normal uninterrupted day that you earn? What would the railroad earn on a normal uninterrupted day by reason of the trailer-on-flat-car service?

A. On trailers from Boston?

Q. Yes, sir.

A. Normally, it would run from $1800 to $2000.

Q. And that would only be one way, isn't that so?

A. That is correct, sir.

Q. Now, did you have any inbound trailers on the days when there was interruption?

A. We did.

Q. Was the number of inbound trailers reduced by reason of the interruption?

A. They were by reason of the fact there were no trailers moving the other way to be loaded up for that reverse movement.

Q. Now, what revenue if any was derived by the railroad on July 12 arising out of its trailer-on-flat-car service?

A. None at all.

Q. And on July 12, Mr. Sundel, you were employed by the railroad and were receiving a salary, weren't you?

A. That's right.

Q. And there were other persons who were normally engaged in this service who were employed on that date and paid?

A. Correct.

Q. Was there any discharge or loss of job on that day because of the interruption?

A. No, sir.

Q. Now, can you tell the Court what was the revenue received by the railroad arising out of the trailer-on-flat-car service performed on July 14?

A. Yes. Well, I will have to give you an offhand figure here of about $400.

Q. Now, will you tell the Court, based on your knowledge of the records and based on your knowledge of this service, what loss if any was suffered by the railroad in dollars and cents directly in the 3 days which we have mentioned?

61] A. In dollars and cents, approximately $5000.

Approximately $5000?

That is correct, sir.

re there any other losses sustained?

e were other direct losses as a result, based on

Q. W t did not develop in a reverse movement, and

A. Th tangible losses, good will and so forth, that

of this action.

failure on the part of the railroad to per-

ns under the bills of lading

Q. Was

fulfill the obligati

A. We certainly did fail in that respect.

Q. Do you receive business from shippers who use the trailer-on-flat-car service for other railroad service?

A. Yes, sir, we do.

Q. And is it your statement that that revenue or that business is endangered or was endangered by the interruption of your flat-car service?

A. It is.

Q. Mr. Sundel, you have direct contacts, do you not, with motor carriers and shippers who use the trailer-on-flat-car service?

A. I do.

Q. Mr. Sundel, during the month of July and, indeed, at any time before July 11, 1952, were you advised by anyone in any manner whatsoever that there was a dispute, a controversy, a demand or a claim made by the union, Local 25, against the motor carriers or shippers who use the trailer-on-flat-car service?

A. No, sir.

Q. Do you know what the cost of construction of flat cars is, what it costs to get a flat car built?

A. In round figures, approximately $8000.

Q. You have checked the books and records and discovered that is——

A. Yes, sir.

Q. You have checked the books and records and discovered what the actual cost is, haven't you?

A. Yes, sir.

[fol. 62] Q. And how many flat cars has the railroad specially constructed for this highly specialized service you have described?

A. Two hundred cars.

Q. And your capital investment, therefore, in the flat cars amounts to what?

A. $1,600,000.

Q. Now, for what purposes other than this trailer-on-flat-car service can these flat cars be used?

A. In my opinion, for no other purpose can they be properly used or adapted to transport any other freight. The construction of the car with the special underframe, with bolts that project from the underframe through the floor

of the car, because of the type of construction, it is not possible to economically do anything else with the car except use it in that service.

Q. Have you ever received requests for service, requests to use this flat car?

A. Let me understand you. Do you mean for other than——

Q. For other than trailers, yes.

A. Yes, I believe I can recall such a request. I recall that this past winter here a company by the name of C. J. Maney Company had placed some of their cement mixers on 3 such cars to build abutments in the North Station Yard. I also recall a movement of a tractor from New York to Providence, I believe it was.

Q. Would you say that those were rare and unusual circumstances?

A. Those are the exceptions to the rule, yes, sir.

Q. I have one further question and I will be through. Mr. Sundel, if the railroad cannot continue the trailer-on-flat-car service, what use if any can be made of the flat cars and other structures which are part and parcel of this trailer-on-flat-car service?

A. Since we are pressed for time here, in my judgment, it would have to be scrapped.

Q. It would have to be scrapped?

A. It would have to be scrapped.

Mr. Burstein: All right, Mr. Sundel.

[fol. 63] And I want to thank your Honor at this time for his patience.

The Court: All right, gentlemen.

We will recess until 10 o'clock tomorrow morning.

(Recess at 4 o'clock, p. m., until tomorrow, July 25, 1952, at 10 o'clock, a. m.)

July 25, 1952.

DANIEL S. SUNDEL, resumed 10:00 a. m.

Direct examination, continued.

By Mr. Burstein:

Q. Mr. Sundel, you testified that in the performance of this trailer-on-flat-car service, the railroad uses not only specialized cars but also employs the facilities of specialized structures such as ramps and the like. Were these facilities specially constructed for the trailer-on-flat-car service at Yard No. 5?

A. They were, sir, for the exclusive use of trailer-on-flat-car service.

Q. Now, in the course of the performance of your duties, have you had occasion to review the records which indicate the cost of construction of these facilities?

A. Yes, sir.

Q. And can you tell the Court what the cost was?

A. Not in so far as breaking down Boston properly, but I would say, roughly, for the over-all facilities at all five points, somewhere in the vicinity of $2,225,000.

Q. Now, would it be correct to state, therefore, that the total investment of the New Haven Railroad in the trailer-on-flat-car service amounts to approximately $3,800,000, taking into account the construction of the special structures [fol. 64] and the cost of constructing the special flat cars?

A. On the basis of $1,600,000, roughly, that would be the sum!

Q. Now, based on your knowledge of this operation—and you stated, Mr. Sundel, that you have been in the railroad business for about 35 years—have you an opinion which you can state as to the usability of these structures in the event that the trailer-on-flat-car service is not continued?

A. They would have——

Q. Have you an opinion, yes or no?

A. Yes, I have an opinion.

Q. And will you please state that opinion?

A. If the type of structure and facility was completely discarded, it would have no other value.

Q. When you say discarded, do you mean if the trailer-on-flat-car service——

A. If the trailer-on-flat-car service was abandoned, it would have no other value for transportation purposes.

Mr. Burstein: All right, sir.

I have no further questions, your Honor.

Cross-examination.

By Mr. D'Arcy:

Q. Mr. Sundel, I believe you testified yesterday and probably again this morning that there were large investments by the railroad in this particular type of flat car which you were using for this so-called trailer operation, is that correct?

A. Yes, sir.

Q. When did the railroad start to have these special type of cars manufactured?

A. Are you referring to our recent type of car?

Q. Well, the one which I think the plaintiff's counsel is contending cannot be used for any other service.

A. In 1950.

Q. And so that you operated from 1937 to 1950 with the ordinary type of flat car?

A. That is not correct, sir. At no time did we use an or- [fol. 65] dinary type of flat car. At all times, the type of car was a special type. We made definite improvements in the type of car we are speaking of now as of 1950.

Q. How many of the special type cars did the railroad have in 1950?

A. Roughly, about 117.

Q. Isn't it true that those particular flat cars which were used for the trailer operation prior to 1950 could have been used for any type of flat-car operation, and weren't they used for any type of flat-car operation, hauling pipe or anything else?

A. I want to understand your question correctly. Do you mean if it were taken out of trailer-on-flat-car service and placed into regular freight-train service?

Q. Yes.

A. The answer is that it is so, with certain reservations.

Q. I think you have answered the question. Then up until 1950, any of the cars which you used in the trailer-on-flat-car service could have been used for any normal haulage?

A. Not exactly, to get back to your question, for this reason: The type of car we used up to 1950 came in two car lengths, one 49 foot 6 inches and the other 53 foot 2 inches. I am not too accurate about the inches. Naturally, the length of the car lent itself to the type of freight transportation you are speaking of now, regular freight-train service in haulage of, say, pipe. Long flat cars are the desired type of car. Now, for your information, the car we use today, being a specially constructed type of car, is only 40 foot in length, allowing only one trailer on a flat car, whereas, back of 1950 and going back a few years, the trend of trailer manufacture produced a type of trailer that was of the shorter order so that we were able to transport two trailers to a car. But as the trend changed, we developed a type of car that was exclusively for the type of trailer that is run and used today.

Q. But that wasn't done until 1950?

A. Circumstances compelled us to do it at that time.

Q. Made it more expedient to try and improve the service in 1950?

A. Always advancing, progressing with that in mind, keeping abreast of progress.

[fol. 66] Q. None of which you felt had to be done until 1950? The operation hadn't expanded that significantly?

A. I wouldn't say the operation hadn't expanded. We had given thought to the change in trend prior to 1950 and, we'll say, it culminated at that time. It was given thought for several years before the change was made, to keep abreast of conditions.

Q. But again, I repeat, prior to 1950, you were able to haul these trailers-on-flat-cars without any substantial investment in trailers cars, flat cars, which could not be used for any other service?

A. No, I deny that to this extent: when the service first started, it was necessary to take and experiment with it, so we took a car and converted it for this purpose, which cost us somewhere in the neighborhood of, I'll say, $1200—my

figure may not be correct—and we made various improvements to this car and we continued to improve it.

Q. Always with the same ordinary type of flat car up until 1950? That's when the special construction actually began, orders for special construction?

A. I don't want to agree to the fact that it's ordinary type because we took the car and transformed it into the type we needed.

Q. Constantly experimenting with minor changes?

A. Yes, sir.

Q. All right, that's good enough. Now, you have testified, Mr. Sundel, that you were down at the Yard No. 5, which is the only particular locus or site in dispute, on July 11, 12, and 14, is that true?

A. Amplifying your own question to this degree, I am not going to answer to the word dispute. However, I was on the property when something happened in the form of trouble.

Q. Can we call it activity?

A. Activity if you wish.

Q. You were there on all three days?

A. Yes, sir.

Q. Those were the only three days with which we are concerned in this proceeding, is that correct?

A. To my knowledge.

A. All right. What time were you down there on the first day, Friday, July 11?

A. I would judge about between 4 and 5 o'clock. I am not too sure of the time.

[fol. 67] Q. And that is the only time that you spent there on Friday, July 11?

A. No, sir. I remained until after the activity for the day normally closes. In fact I think I left the premises somewhere after 9 o'clock, Daylight Time.

Q. So you would say that on Friday, July 11, you were at the premises of Yard 5 where this activity occurred?

A. Yes, sir.

Q. From approximately 4 or 5 until 9 p. m.?

A. Right, sir.

Q. Now, you testified yesterday that you saw agents of the defendant union and the agents who are defendants

themselves engaging in some sort of activity which diverted trailer trucks away from Yard 5, is that correct?

A. I observed such activity.

Q. Would you tell the Court exactly what activity you observed?

A. I observed the two gentlemen you mentioned, or the agents——

Q. I didn't mention anybody by name. Would you care to?

A. I was told that the two men that were involved on that day were Messrs. McCarthy and Norton. From where I stood, I observed that they waved their hands to indicate in the manner which I would interpret as "go back," and I saw a trailer and tractor turn away from the yard and proceed in the direction that apparently it came from.

Q. So all you saw were one or two men standing somewhere near the entrance to Yard 5 waving their hands at a driver of a truck, is that correct?

A. I can't attest to whether it was one or two men. I happened to have seen these men and their activity. There might have been other activity——

Q. You only saw one or two men, is that a fair statement of what you say?

A. Two men, right, sir.

Q. And you saw either of these two men wave at a driver of a truck, is that correct?

A. Yes, sir.

Q. A single truck?

A. When you say that—I am talking of a tractor and trailer; put it that way.

[fol. 68] Q. I think we can agree that the tractor and trailer is a truck.

A. There was more than one involved. The number I can't quote at the moment.

Q. Would you take a moment and review your best memory and try and ascertain how many were involved?

A. I would say in excess of 10 to perhaps 17.

Q. This is in the period of from 4, approximately, until 9 p. m.?

A. The closing hour for the receipt of trailers would be 8:30 Daylight Time, so we can confine it to that period.

Q. All right, fine. So you saw one or two of these gentlemen who were reported to you to be agents of the defendant union wave at drivers of trucks?

A. Right, sir.

Q. During that period?

A. Right, sir.

Q. And when they waved at the drivers of these trucks, did they say anything to them to your knowledge? Could you hear them say anything?

A. No, sir.

Q. All you saw them do was wave at the truck drivers?

A. That is correct.

Q. And the truck drivers then turned their trucks around and left, is that correct?

A. Right, sir.

Q. Can you identify any of the owners of those trucks? What I mean by that question is this: you say there were between 10 and 17 trucks diverted away from Yard 5 on that particular day because one of two gentlemen who are named defendants waved at the drivers of the trucks. Now, can you identify who owned those trucks in any way?

A. By that you mean as to what I might have seen on the side of the truck identifying the owner?

Q. I think the law requires that the owner put his name on the side of the truck, yes.

A. Yes. Do you mind if I look at my record here——

[fol. 69] Q. Did you make notes at the time?

A. No, I didn't.

Q. Before you look at the records, Mr. Sundel, you didn't make notes at the time?

A. No, sir.

Q. Then what records do you want to refer to, please?

A. Those that were told to me. In other words, there were others on the premises who apparently had taken notes.

Mr. D'Arey: I move to strike the answer, your Honor. It's not responsive to my question.

The Witness: I observed——

The Court: Well, he hasn't answered it yet.

The Witness: May I rephrase that? I observed certain trailers and trucks or tractors and trailers being turned away. I would like to give you an accurate answer based

on some of the information that I would like to refresh my memory from.

Q. Well, I am perfectly willing, Mr. Sundel, that you refresh your memory with anything which you wrote down about things you saw but nothing that was told to you by somebody else. That is clearly something for somebody else to testify to.

Mr. Burstein: I submit that that isn't a proper comment by counsel. A witness may refresh his recollection from any document.

The Court: Refresh his recollection, yes, but as he puts it, he hasn't a recollection. He said he was told.

Mr. Burstein: There was no testimony that he hasn't a recollection, your Honor. I think that if the witness were asked whether he had a recollection and he answered no, he can't refresh his recollection; but if he answers yes, of course he can refresh it by any document.

The Court: But counsel doesn't want him to testify to hearsay, something that somebody else told him. That's as he has left it now.

[fol. 70] Now, go ahead. Next question.

Q. Then you have no records, Mr. Sundel, which you made of your own observation, is that correct?

A. May I amplify that to answer your question? That very night, I returned to the office and typed up a list which contained information that was partly my own and partly others. In other words, I had on that evening a list that would show what trailers were turned away.

Q. Could you in looking at that list tell what of that information was related to you by somebody else and what is what you saw yourself?

A. If I am permitted to look at the information, I may be able to answer your question.

The Court: Certainly, of course you can.

The Witness: I am ready to answer your question.

(Last question read by the stenographer.)

Q. You can, I take it?

A. Yes, sir, I can.

Q. Then testifying from the records you made of those things which you yourself observed and nothing of what anybody told you, would you tell us which employers' trucks were hailed in the manner which you have designated?

A. Yes, sir. I recall seeing a Harrison Trailer.

Q. One Harrison Trailer, is that correct?

A. Would you care to have the time when that was observed?

Q. It doesn't matter to me. If you feel it's important, all right.

A. 4:30 p. m., Daylight Time.

Q. One Harrison Trailer at 4:30?

A. Right, sir. Then there was a D & N at 4:55.

Q. One D & N?

A. Right sir.

[fol. 71] Q. All right.

A. A Rand at 5:35.

Q. One Rand?

A. Right, sir. One Sears at 6:22.

Q. About the Sears truck, did you notice anything particular other than what you have signified, whether or not the defendant agents did any more than wave to the driver?

A. In that case—I am glad you brought it up because the driver of that Sears trailer——

Q. No, answer the question, please. Did you observe anything else other than one of these agents waving at the Sears truck?

A. Yes, sir.

Q. All right. Would you proceed?

A. In that case, I was in the caboose office of the trailer yard.

Q. In what office?

A. The caboose office, to identify it, the trailer yard caboose office, when this driver came in and asked for permission to use our telephone so that he might report his experience at the yard.

Q. Now, I ask you did you notice anything else which happened when this driver came up to the yard other than that the defendant agents waved at him?

A. Other than what I have just explained to you?

Q. Yes. I am asking you about the activity of the defendant agents.

A. Yes, other than what they did in the case of Sears.

Q. What you saw them do when the Sears truck came up.

A. Other than that, no sir.

Q. All you saw them do was wave. I think that's responsive. Would you go on and describe the trucks that you saw that were diverted?

A. That's all, unless you care to have the list of the others.

Q. I don't think it's of any significance unless we have the witnesses who related that information to you. Now, do you know, Mr. Sundel, whether or not the defendant union [fol. 72] has any collective bargaining agreement with Harrison, D & N, Rand, or Sears?

A. I know of no collective bargaining agreement. I know of nothing about that.

Q. You know of no collective bargaining agreements which the defendant union had with anybody, is that correct?

A. That's correct.

Q. Could you tell us whether or not the New England Transportation Company is a subsidiary of the New Haven Railroad?

A. I understand it is.

Q. You as a long-time employee understand that it is, is that correct? That is something of your knowledge, is it?

A. Through the annual report, where a report is made to that effect.

Q. And you have accepted that as the truth?

A. Yes, sir.

Q. Do you know whether or not the New England Transportation Company has any contract with the defendant union covering the terms and conditions of employment?

A. I do not.

Q. You do not. Can you tell me—and I believe you testified yesterday that railroad employees handle all these particular trailers either when they are being put on the flat cars or when they are being taken off the flat cars. I think you testified that that is so.

A. Well now, you are indicating that all are railroad em-

ployees. Would you make that question a little clearer so I can understand what you are driving at?

Q. Do any employees of the New York, New Haven and Hartford Railroad, once those trailers get into Yard 5, either on the way from Boston out or on the way in coming from other points—are any of those trailers handled by employees of the railroad?

A. Well, if I am to answer your question, there is the mechanical department, whose employees tie down these trailers on the outbound movement.

Q. And those are railroad employees?

A. Yes, sir.

[fol. 73] Q. They only touch trailers then on the outbound movement, is that correct?

A. No, sir. They also untie trailers on the inbound.

Q. All right. I accept the answer. It is also true that once these trailers are either tied down or untied on the incoming one that they are then taken off the flat cars or put on the flat cars, depending upon which way they are being transported, by employees of the New England Transportation Company?

A. You mean the removal—let's put it this way: on the outbound, that trailer is handled by the N.E.T. to over the ramp and on to the flat cars.

Q. Or probably from the outside, from, let's say, Pepsi Cola to the yard.

A. Well, confining ourselves to the yard—I don't know anything about the other—yes, the railroad undertakes that service.

Q. The railroad or the New England Transportation?

A. We are rendering a service to the shipper or the public and so we undertake that. Now, you are trying to define it in this respect, as to what part the New England Transportation Company plays in that matter?

Q. No. May I correct your statement of my question. My question is this: do employees of the New England Transportation Company handle each and every of these trailers either in the process of unloading or loading, either within the yard for those that are delivered there or to deliver them someplace else?

A. Yes.

Q. They do. Each and every trailer is handled by an employee of the New England Transportation Company?

A. In so far as moving it in the yard on to the flat car or from the flat car back to the yard.

Q. So that again, I repeat, and I think you can answer yes or no: a New England Transportation Company employee handles every trailer which either goes on the flat car or comes off the flat car, is that correct?

A. Yes, sir.

Q. Thank you. Now, you have stated that you saw on July 11, Friday, trucks being diverted. You have nothing to add in the way of information for the Court as to what the agents of the defendant union did in diverting those [fol. 74] trailers, as you call it, diverting. They only waved, is that correct? I think that's what you testified to.

A. You are trying to confine my statement now to what I saw?

Q. That's correct.

A. In other words, I might add that I was very much surprised by the action, if that's what you want in the record, too, without due notice or any——

Q. May I interrupt you for a moment?

A. You are asking for information.

Q. That's correct, and the only information I ask for is whether or not you observed anything other than the agents of the union waving at the drivers of these particular vehicles?

A. The answer is yes.

Q. The answer is yes, you observed something?

A. In other words, it's the only thing I observed.

Q. Well, the answer is no.

A. All right, the answer is no.

Mr. D'Arcy: May I move to strike out any unresponsive answer?

The Court: Certainly.

Q. Now, is it true or not true that on Friday, July 11, any of the so-called trailers came to Yard 5 and were permitted to enter Yard 5, and by that I mean trailers belonging to anybody?

A. That's true. Trailers were permitted to enter Yard 5 prior to the appearance of the gentlemen we speak of.

Q. All right, that's fair enough. Were any permitted to enter after that time?

A. After the Local 25 representatives were on the scene, no.

Q. None were permitted to enter. Do you have records of any shipments or any knowledge of trailers received for shipment on that particular day? I think you have plenty of records with you. You must have some.

A. Yes. On the outbound on July 11——

[fol. 75] Q. Oh, incidentally, Mr. Sundel, on the inbound trailers——

Mr. Burstein: Pardon me. I think the witness ought to be permitted to answer the question now before him.

The Court: All right, sure.

The Witness: Outbound on July 11, there were two trailers loaded and forwarded on that day.

Q. Can you identify who owned those trailers?

A. Yes. There is the Costello Distributing Company Trailer No. 11, loaded on New Haven Car 17656.

Q. I think it is sufficient that you can answer that the truck was permitted to be loaded without any interference.

A. Perhaps it would be well to identify the time in relation to other incidents. That trailer arrived in the yard at 2:30, Daylight Time.

Q. Yes.

A. Let me just say, without amplifying Daylight or Eastern Standard Time, it reads here 1:30, and it was loaded on hour later, 2:30. Now, the second trailer——

Q. May I ask you one further question about the first trailer belonging to Costello. Do you know whether or not the defendant union has any collective bargaining agreement with Costello?

A. I do not, sir.

Q. Was that trailer belonging to Costello in any way interfered with while it was on the railroad's property in any manner?

A. Not to my knowledge. It's obvious that if it was loaded, nothing was done to stop it from loading.

Q. Even though the New England Transportation Company employees handle each and every trailer, nothing

was done to interfere with that particular trailer, is that correct?

A. Yes, sir.

Q. Now, the other one.

A. Pepsi Cola Company Trailer No. 201, loaded on New Haven Car 17631 approximately 15 minutes later. Those [fol. 76] are the two trailers that were permitte' to be loaded that day, although in the yard at approximately the same time were three Harrison trailers. We were not permitted to forward those trailers.

Q. When you say "we were not permitted to forward those trailers," just what do you mean? Who prevented you from forwarding those trailers?

A. I mean that by instructions given through——

Q. Is this a conclusion?

A. Observation. In other words, what didn't happen is the result of observation. We know that normally trailers received in the yard are loaded, and if there is a principle of not loading them, something occurred which prevented it. Now, these three trailers were received at approximately the same time these two others that were loaded were, but they were not permitted to be taken from the parking spot in the yard and loaded. Yet, we signed for them and we undertook a contract to transport those three trailers.

Q. May I interrupt you for a moment? When you say they were not permitted to be loaded, do you have any knowledge of any method by which these particular vehicles were not permitted to be loaded?

A. Yes.

Q. Did you see anything in which you can say the defendant union did anything to prevent the loading of those trailers?

A. I know that after these first two trailers——

Q. Can you answer yes or no first of all?

A. Yes.

Q. Now, will you state what you observed in the way of interference from the defedant union?

A. All right. To the best of my knowledge, I observed a New England tractor, used for the purpose of taking a trailer that is parked in our yard, under a Harrison trailer,

about to go up the ramp, and it was stopped by a waving of the gentlemen involved, and the trailer was detached from the tractor and left on the ground.

Q. Now, I think, Mr. Sundel, you have stated the conclusion that this tractor was stopped by a waving of one of the gentlemen to whom you previously referred?

A. Right, sir.

[fol. 77] Q. Will you state just what he did? He waved at the driver, is that correct?

A. He waved in a manner to indicate a stoppage.

Q. He waved at the driver?

A. Right, sir.

Q. Just what manner it was in is something the Court will determine.

A. In order to indicate: stop what you are doing.

Q. He waved at the driver, is that correct?

A. That's correct.

Q. You don't know what manner he waved in or what his purpose was, is that true? You don't know of your own knowledge?

A. I know that whatever he did was symbolic of stoppage.

Q. You know that whatever he did was symbolic of stoppage because the employee involved then did not choose to engage in the particular operation which he was then operating?

Mr. Burstein: I object to the characterization of the testimony. The witness has already answered what he observed. He is testifying to his own personal observation.

Mr. D'Arcy: I would like to state, your Honor, that all I am trying to do is let the witness state as to exactly what he——

The Court: Don't argue about it. I think he has a right to draw an inference.

Mr. D'Arcy: You think the witness has the right to draw that inference?

The Court: From what he saw, sure.

Q. That employee involved then was an employee of the New England Transportation Company, is that correct?

A. The gentleman who drove the tractor that I mentioned, yes, sir.

Q. Thank you. You have stated, Mr. Sundel, that there was no interference to either of the other two vehicles which were brought to Yard 5 for shipment on flat car, [fol. 78] one belonging to Pepsi Cola and one belonging to Costello, is that correct?

A. Yes, sir.

Mr. D'Arcy: No further questions.

Redirect examination.

Mr. Burstein: I have just two further questions, your Honor.

By Mr. Burstein:

Q. Mr. Sundel, in response to a question put to you by Mr. D'Arcy, you stated that to the best of your knowledge the New England Transportation is a subsidiary of the New Haven, is that correct?

A. Yes, sir.

Q. And I believe you testified that when the trailers come into the yard, a New England Transportation employee drives the trailer up the ramp and onto the flat car, and from that point on, the flat car is handled by a railroad employee?

A. Right, sir.

Q. You stated, I believe, in response to a question put to you that this service had been provided since 1937 or 1938, is that correct?

A. Right, sir.

Q. And do you know whether or not at any time after the institution of this service any trucking company other than New England Transportation Company handled the driving of the trailer within the confines of Yard 5 up the ramp and onto the flat car?

A. At one time very early in its inception, I believe a trucking company by the name of Bowen performed such service.

Q. Is Bowen an independent trucking company?

A. Yes, sir.

Q. And no subsidiary and no affiliate of the New Haven Railroad?

A. None whatever.

Q. One final question, Mr. Sundel. At any time prior to July 11, 1952, did Local 25 to your knowledge take any steps or make any act to interfere with the operation within the confines of the yard such as you have described occurred on the three days in question?

[fol. 79] Mr. D'Arcy: Objection, your Honor.

The Court: I'll hear it.

The Witness: No, sir.

Mr. Burstein: I have no further questions.

Recross-examination.

By Mr. D'Arcy:

Q. Mr. Sundel, you have testified that prior to 1938, I believe, the operation which is now handled by the New England Transportation Company employees was handled by other than New England Transportation Company employees?

A. Sometime in that area.

Q. Now, I ask you to confine yourself to the three days in question in this particular suit. Only New England Transportation Company employees handled those trailers at that time, is that correct?

A. In that category, yes.

Q. Yes. Would you state that the activity that went on on that day, Friday, was the same as the activity of the other days in question?

A. I would like to have you clarify that question when you say that there is a similar activity on Friday, July 11; with say, Thursday, July 10.

Q. Oh, no. When I talk about the days in question, I mean Friday, July 11, Saturday, July 12, and Monday, July 14, the days in this particular action.

A. In the sense that there was a stoppage.

Q. In the sense that there was a hailing of drivers?

A. I would say yes, sir.

Mr. D'Arcy: That's all.

Mr. Burstein: I have no further questions of this witness.

(Witness excused.)

[fol. 80] Mr. Burstein: Mr. Martin.

JOHN H. MARTIN, Sworn.

Direct examination.

By Mr. Burstein:

Q. Please state your full name and home address.

A. John H. Martin, 76 Rawson Road, Wollaston, Massachusetts.

Q. What position do you hold in the plaintiff New Haven Railroad?

A. Freight agent, Boston.

Q. How long have you been employed by the New Haven Railroad?

A. Forty-four years.

Q. And how long have you held your present position as freight agent at Boston?

A. Since February 1.

Q. And prior to that time, I take it you were an assistant freight agent at various other points, including Boston?

A. I was freight agent at Providence, Rhode Island, and assistant freight agent in Boston.

Q. Will you briefly describe your present duties?

A. General supervision of forwarding of all freight, the handling and receiving of freight.

Q. Are you familiar with the physical layout and appearance of Yard No. 5 on Northern Avenue in Boston, Massachusetts?

A. I am.

Q. I show you this photograph and I ask you if this correctly represents the appearance of that yard, Yard No. 5?

A. It represents the portion allocated to trailer operation.

Mr. Burstein: I respectfully offer it in evidence, your Honor.

Mr. D'Arcy: No objection.

[fol. 81] The Court: All right. Mark it.

(A photograph showing a view of Yard No. 5 marked Plaintiff's Exhibit No. 2.)

Q. Mr. Martin, sometime prior to 3:30 on July 11, 1952, you were at your office at Yard No. 7 were you not?

A. Well, I was in Yard No. 7.

Q. You were in Yard No. 7. And did you receive a call from any of your agents or assistants at about 3:30 p.m. of that day?

A. I received a call from one of my assistant agents.

Q. What did he tell you?

A. About 3:30.

Q. What did he tell you, sir?

A. There was trouble at the trailer platform in 5 Yard.

Q. Did he tell you what kind of trouble?

A. No, he didn't mention it.

Q. What did you do in response to that call?

A. Well, I journeyed up to 5 Yard, reaching there somewhere between 3:15 and 3:30.

Q. And when you arrived at Yard 5, what did you observe? And in that connection, you might refer to Plaintiff's Exhibit No. 2 and point out to his Honor the various locations of the parties. The location of the parties are material to the description of the activity at that date and hour.

Mr. D'Arcy: Your Honor, may I ask a question on that particular exhibit? May we agree that that particular exhibit shows only railroad property?

Mr. Burstein: Oh, yes, we agree.

I think it would be helpful if Mr. Martin pointed out to his Honor precisely the location of the loading platform.

[fol. 82] The Witness: Right along here.

The Court: This, you say, is all railroad property?

The Witness: That's right.

The Court: Northern Avenue is out of the picture?

The Witness: That's right.

The Court: Northern Avenue runs along here?

The Witness: That's right.

The Court: All right.

The Witness: Now, when I arrived there, we had——

Q. Will you speak up please?

A. When I arrived at 5 Yard, there were 5 trailers in the yard.

Q. Would you indicate to his Honor approximately where those trailers were at the time that you arrived at 5 Yard?

A. There was one here to the left of this ramp here and one had been loaded, and there were 3 just about where these 2 are now.

Q. What else did you observe? You saw the 5 trailers. What did you observe beyond that?

A. I observed some persons, who I found out belonged to Local 25, down here about in the center on Northern Avenue, adjacent to the middle of our property allocated to the trailer-truck-operation, and I went over and spoke to them.

Q. Who were those persons to whom you refer?

A. Mr. Norton and Mr. McCarthy.

Q. And did you have a conversation with Mr. McCarthy and Mr. Norton?

A. I went over and I asked them, "What goes?"

Q. And what did either Mr. McCarthy or Mr. Norton say? And will you please identify the speaker.

A. Mr. McCarthy replied that he had no trouble with the New Haven Railroad.

[fol. 83] Q. Had no quarrel with the New Haven Railroad?

A. No quarrel with the New Haven Railroad.

Q. No dispute with the New Haven Railroad?

A. No quarrel with the New Haven Railroad. And I said: well, about loading these trailers that were in there. I got no reply in regard to that.

Q. Was that the end of your conversation?

A. That was the end that day.

Q. What did you do after the conversation?

A. Well, I stayed there, and I noticed trailers drive up which would ordinarily be loaded onto our flat cars.

Q. Will you indicate to his Honor where those trailers came in, those trailers which you observed following your conversation with McCarthy and Norton?

A. They would come down, as coming down from Atlantic Avenue, down Northern Avenue, and when they got to about this spot where Messrs. McCarthy and Norton were standing, they would be stopped.

Q. What did you observe? Tell the Court precisely what you saw Norton and McCarthy do as the trailers

arrived at the point which you indicated on that photograph when you showed it to the Court.

A. The trailer would be stopped, and on occasion, Mr. McCarthy would step on the running board of the tractor and, I suppose, have some conversation. At least, that's what the appearance was. But as to what was said, I was not able to hear.

Q. But you noticed that McCarthy spoke with the driver of the tractor?

A. That's right.

Q. And then what did he do?

A. The driver drove away.

Q. Without leaving the trailer in the yard?

A. Without leaving the trailer in the yard.

Q. What else other than what you have just described did you observe at the yard on July 11 following your [fol. 84] conversation with McCarthy and Norton?

A. Only that there were two trailers loaded, but three belonging to Harrison were not loaded, and we were stopped from loading.

Q. Now, will you tell the Court how these incoming trailers were stopped? What action or activity did Messrs. McCarthy and Norton participate in or initiate which resulted in the stoppage of the trailers?

Mr. D'Arcy: Objection, your Honor.

I think we can agree that when you refer to incoming trailers in this particular question, you are talking about trailers that were coming to Yard 5 for shipment out of Boston.

Mr. Burstein: That's correct.

Q. Would you answer the question please?

A. Would you repeat it?

(Last question read by the stenographer.)

The Witness: By the refusal of the drivers of the New England Transportation to load——

Q. I am not talking of the trailers already in the yard. You testified that there were trailers coming into the yard off Atlantic Avenue, as I recall, towards Northern

Avenue, and these trailers were stopped. Do you recall that?

A. Yes.

Q. And I believe you testified that Norton and McCarthy stopped those trailers. Do you recall that?

A. That's right.

Q. I ask you to describe what Norton and McCarthy did which resulted in the stoppage of those trucks. Did they wave their hands? Did they genuflect? Did they move their hands in a variety of gestures? That's what I want you to tell us.

A. The signal was usually this (witness indicating with hand), and the driver stopped.

Q. And thereafter they would board the trailer or tractor and speak with the driver?

A. That's right.

[fol. 85] Q. Now, how many trailers of that kind did you see stopped in the manner you have just described?

A. Oh, I would say about 10 or 12.

Q. And in each instance, you saw Norton or McCarthy raise his hand in a gesture indicating stop, the kind of a gesture, let's say, a policeman uses when he stops traffic in the street?

A. That's right.

Q. At what time did you leave Yard 5 on July 11?

A. Oh, in the neighborhood of 5:30.

Q. Now, you say they stopped the New England Transportation drivers from loading the 3 Harrison trailers, those which had already been in the yard at the time of your arrival. Will you tell the Court precisely what you mean by that and how the stoppage was effected in that case?

A. By the refusal of the New England drivers to do what they were ordinarily hired to do.

Q. Were the drivers around, the tractor drivers around?

A. They were there.

Q. Were they walking up and down?

A. They were standing toward the tractor.

Q. But they weren't in the tractor in their usual and ordinary activity?

A. That's right.

Q. Now, apart from this conversation with Norton-McCarthy which you described earlier, you had no further conversation with them on July 11, is that correct?

A. Nothing further.

Q. All right. Now, did you return to Yard 5 on July 12, at about 2 p.m.?

A. I did. I drove down there about 2 o'clock.

Q. And at that time, did you observe anything?

A. Well, there was no action but I observed Mr. McCarthy there.

Q. Mr. McCarthy. Was he accompanied by Mr. Norton?

A. I wouldn't say on that day.

[fol. 86] Q. I see. Now, did you have a conversation with Mr. McCarthy at that time?

A. Well, from my car——

Q. Did you have a conversation?

A. I did.

Q. Was anybody present at the time you had that conversation?

A. Only Mr. McCarthy and myself.

Q. Now, tell the Court what you said to Mr. McCarthy and what Mr. McCarthy said to you.

A. I said, "Just the same?" He said, "Yes."

Q. What else?

A. That was all the conversation.

Q. Did you inquire as to whether or not you would be able to continue the trailer service on Monday?

A. Only so far—Well, I would say no that day.

Q. Did you ask Mr. McCarthy why the action had been taken by the union?

A. Not that day.

Q. As a matter of fact, did you ask him whether or not this action was authorized by the union?

A. No, I didn't.

Q. Did he tell you that it had been authorized?

A. No, he didn't.

Q. So far as you knew, Mr. McCarthy was acting on his own?

A. That's right.

Q. And the same would be true of Mr. Norton?

A. That's right.

Q. That either of these gentlemen had elected to stop the operation of the trailer service?

A. That's right.

Q. That was your understanding?

A. That's right.

Q. Now, do you know whether or not any trailers were in Yard No. 5 on the 12th that had arrived the previous night?

A. The 3 Harrisons were.

[fol. 87] Q. Do you know whether or not there was freight in those trailers?

A. No, they were empty.

Q. They were empty. Do you know whether or not they were destined for any particular point or whether they were supposed ot be removed from Yard 5?

A. They were to go to New York.

Q. New York. Where they were to be loaded and returned back to Boston?

A. That's right.

Q. Now, did you appear at Yard No. 5 on the 14th, July 14, 1952, at or about 3 p.m.?

A. I did.

Q. And at that time, were the business agents, Messrs. McCarthy and Norton, present?

A. No, sir.

Q. Were there any business agents present at that time?

A. None.

Q. When did they show up if they showed up that day?

A. Oh, shortly after 4 o'clock.

Q. All right. Now, at the time you arrived at Yard 5, what did you observe, on July 14, 1952?

A. I observed that we had 20 trailers on the ground, parked on the ground, and that we were loading trailers.

Q. You were loading these 20 trailers or in the process?

A. Yes, sir.

Q. Do you know how many of these trailers were loaded?

A. Eight.

Q. Now, between what hours were these 8 trailer loaded?

A. Up to between the hours of 3 and 4:15.

Q. Now, between the hours of 3 and 4:15, Messrs. McCarthy and Norton were not in the premises or in the vicinity of Yard 5, is that correct?

A. That's right.

[fol. 88] Q. And, accordingly, the drivers of the N. E. T. tractors were hauling the trailers up the ramps onto the flat cars?

A. They were.

Q. And, accordingly, the usual and ordinary services performed by the New Haven Railroad were going on without interruption?

A. That's right.

Q. And then at 4:30, Messrs. McCarthy and Norton arrived, is that correct?

A. Around that time.

Q. And what did they do? Tell the Court what you observed and indicate if you had any conversation with them.

A. They stopped the New England drivers from proceeding further with the loading of trailers.

Q. Now, when you say they stopped the New England drivers, will you tell the Court what you saw Messrs. McCarthy and Norton do? Did they go over to see somebody? Did you see them talking to anybody?

A. They signaled to the drivers of the New England tractors and they came out there——

Q. When you say they signaled, what kind of a gesture did they use? Did they say: come over here? Did they lift their arms in a signal to stop?

A. Well, they told them to come over.

Q. They gestured to them and asked them to walk in their direction

A. That's right.

Q. What else did you observe?

A. That the New England drivers talked to Mr. McCarthy and after that there was no more loading.

Q. No more loading. Now, did you have a conversation with Mr. McCarthy?

A. I did.

Q. And who was present at that time?

A. I think it was just Mr. McCarthy and myself.

Q. Will you tell the Court what Mr. McCarthy said to you and what you said to Mr. McCarthy?

[fol. 89] A. Well, I asked him why the stoppage and why the New England drivers were stopped. And he said, "The New England drivers refuse to cross the picket line." I said that at 3 o'clock when these drivers came to work, there was no picket line, that when these 20 trailers were given to us and we signed for them, there was no picket line.

Q. And when Mr. McCarthy and Mr. Norton came, there was a picket line?

A. There was no picket line until they came.

Q. And what kind of picket line did they set up?

Mr. D'Arcy: Objection, your Honor. I think the term "picket line" is a conclusion.

Mr. Burstein: The term "picket line" is no longer a word of art.

The Court: Let him testify to what he saw.

The Witness: I saw Messrs. McCarthy and Norton and occasionally one or two truck drivers stop—I don't know whether it was for conversation or not—and they stayed there in about the center of this property allocated to trailers on Northern Avenue.

Q. Now, will you describe for the Court what these two gentlemen were doing? Were they patrolling up and down that entrance way?

A. No, they were stationary. Mostly, they had some other truck driver to talk to.

Q. I see. And every time a truck approached or a tractor and trailer approached, they spoke with the driver, is that your statement?

A. Trailers that would ordinarily be delivered to us for forwarding.

Q. I don't hear you.

A. Trailers that ordinarily would be given to us for forwarding, they would stop them.

Q. Before they entered into the yard?

A. That's right.

Q. And before they were disengaged from the tractors to be loaded on to the flat cars?

A: That's right.

[fol. 90] Q. Now, is it correct to state that Messrs. Norton and McCarthy, starting at about 4:30, directed the drivers of the New England Transportation to discontinue loading the trailers on the flat cars and simultaneously diverted trailers that were about to enter Yard 5?

Mr. D'Arcy: Objection, your Honor. I think the witness has testified that he heard or he saw or he believed that Messrs. Norton and McCarthy spoke to the employees of the New England Transportation Company. Thereafter the New England Transportation Company employees did not load those particular vehicles. I think——

The Court: Are you stating now your memory of what he has testified to?

Mr. D'Arcy: Well, I object on the ground that he is now asking him to state a conclusion again. He has already testified as to what he saw on this particular occasion.

The Court: Well, read the question.

Mr. Burstein: I will withdraw the question and that will make it easier for everybody.

The Court: All right.

Q. Did you testify that you saw Norton-McCarthy speak to drivers of the New England Transportation and that thereafter the loading of trailers on flat cars came to an end on July 14? Did you testify to that?

A. Yes.

Q. Did you also testify that you saw Norton and McCarthy and maybe one or two other truck drivers at the entrance to the yard stop incoming tractor-trailers which normally come into the yard for loading?

A. Yes.

Mr. D'Arcy: Objection, your Honor. He is leading the witness all over the place.

The Court: He is just asking him if he testified that way.

[fol. 91] Mr. Burstein: That's right.

The Court: The question doesn't bother me anyway. If he has already testified that way, why bother to ask him again?

Mr. Burstein: I think you are correct. It is redundant and unnecessary, your Honor. I will withdraw the latter question.

Q. I believe you started to tell us the substance of the conversation between yourself and Mr. McCarthy. Was there anything you wanted to add to that?

A. I asked Mr. McCarthy, inasmuch as there was no picket line when these trailers were delivered to us and that we had signed for them, why weren't the New England drivers allowed to load those inasmuch as they had not crossed the picket line and neither had the New England drivers. I didn't get any reply to that, and then a telephone message came for me. I went into the little office there to answer the telephone, and when I came back the 3 tractors—their location had been changed from being on our property to onto Northern Avenue, the other side of the picket line.

Q. In other words, the 3 trailers—are you talking about trailers or tractors?

A. Tractors.

Q. The 3 tractors which were on Yard 5 before the phone call were now on Northern Avenue?

A. That's right.

Q. One further question, Mr. Martin: when Mr. McCarthy said to you that the New England Transportation men refused to cross a picket line—incidentally, were those his words, the N. E. T. men refuse to cross a picket line?

A. That's right.

Q. Did you say to Mr. McCarthy, "Is there a picket line?" Did you ask him where the picket line was?

A. No, I didn't.

Q. Did you ask Mr. McCarthy why he was interfering with this service which had been in operation since 1938?

A. I did that the first day that I came down.

Q. Did you repeat that question?

A. Not that day.

Mr. Burstein: I have no further questions, your Honor.

[fol. 92] Cross-examination

By Mr. D'Arey:

Q. Mr. Martin, with reference to that picture which you have shown the Court and upon which you testified, could I straighten out something? Is it true that in all your testimony, any activity which you saw the defendants Messrs. McCarthy and Norton engage in was activity which was engaged in upon Northern Avenue, a public highway?

A. Well, I——

Q. Well, let me put it this way——

Mr. Burstein: I think the witness ought to answer that question. It's a perfectly good question.

The Witness: Yes, I would say.

Q. Then you saw no activity by the defendants on railroad property?

A. That's right.

Q. Thank you. Now, you have testified that several of these trailers would be stopped, I believe you said, on Friday, 10 or 12?

A. Yes.

Q. When you say stopped, do you mean that the defendants stopped them or that they were already stopped when you observed them?

A. That they stopped.

Q. You saw the defendants hail and stop 10 or 12 trailers which would not have stopped, in your opinion unless they waved to them?

A. That's right.

Q. You then saw the defendants engage in some conversation with the drivers of those particular trailers?

A. That's right.

Q. You did not see them threaten the drivers in any manner of gesticulation?

A. No, no.

Q. On any of the days in question—and I direct your attention to Friday, Saturday, and Monday, July 11, 12, [fol. 93] and 14, the only days in question here, did you see any persons patrolling along the highway abutting Yard 5?

A. You mean going back and forth?

Q. Yes.

A. Other than Messrs. McCarthy and Norton, they would walk a little distance, and there were others but I couldn't identify them.

Q. Did you see any other walking, patrolling back and forth, or did you just see these people standing in a group and conversing and shifting from one leg to another? Is that a fair statement of what you saw?

A. That's just about it.

Q. Did you see anybody marching back and forth in more or less close formation on these days in question?

A. No.

Q. Did you see any of the defendants obstructing passage to those entering or leaving the premises of Yard 5?

A. Well, only some of these trucks that would want to—some of the drivers that Messrs. Norton and McCarthy wanted to talk to, they would stop them and more or less obstruct the entrance to one or the other entrances of the yard.

Q. When you say more or less obstruct, you mean they hailed them and then spoke to them, is that correct?

A. That's right.

Q. Now, when you say they spoke to them, that to you means they more or less obstructed, is that right?

A. That's right.

Q. Did you see them stand in front of the vehicle to prevent its being moved into the yard or in any manner trying to prevent the vehicle from being moved into Yard 5?

A. Other than by their gestures——

Q. No, just answer the question yes or no, please.

Mr. Burstein: He has answered your question.

Mr. D'Arcy: The question can be answered yes or no.

The Witness: Yes.

[fol. 94] Q. You saw them physically obstructing the passage of these vehicles?

A. By their gestures.

Q. Were these gestures from the side hailing at the driver or were they out in front of the truck?

A. At the side.

Q. At the side. They were at no time physically in front of the truck trying to prevent the passage of the vehicle, is that correct?

A. No.

Q. When you say no, do you mean it is correct?

A. That's right.

Q. Thank you. Would you say that any of the activity of the defendants—and I think you have testified all you saw them do was wave—was impeding free and uninterrupted travel along the public way, Northern Avenue?

A. Well, of course, where——

Q. I think you can answer yes or no.

Mr. Burstein: I think the witness should be permitted to answer fully. I think the Court should have all the facts. We haven't objected on a number of occasions, but I think the witness should be given an opportunity to state fully what the facts are.

The Court: Do you remember the question now?

The Witness: Yes.

The Court: Can you answer it?

The Witness: The answer is that whenever trucks are stopped on a public highway such as Northern Avenue it's bound to create a little congestion. It's a busy street.

Q. Now, would you say, Mr. Witness, that every truck which you saw—and let's change it from stopped to parked—would you say that every truck you saw parked on Northern Avenue was hailed and stopped by the defendant?

A. Around this facility?

[fol. 95] Q. Can you testify that you saw the defendants hail and stop each vehicle?

A. No—do you mean every vehicle?

Q. That's correct, every vehicle which you saw parked on Northern Avenue in the area of Yard 5, and by vehicle, I mean the trailers, of course.

A. At least 90 per cent of them.

Q. You would say you saw at least 90 per cent of them hailed?

A. That's right.

Q. Would you tell the Court how many persons were participating in this particular activity?

A. Well, I only had conversation with the two, but at times, there might be two there and there might be a half dozen.

Q. But so far as you know, only two were engaged in any activity in trying to divert any of these trailers?

A. That's right.

Q. Just two?

A. Yes, sir.

Q. Thank you. Were any of their manners in any way threatening, in your opinion, or do you say you just observed them hail and speak?

A. That's right.

Q. By that's right, you mean you only heard them hail and speak?

A. That's right, hail and speak.

Q. Now, you testified, Mr. Martin, that you saw 10 or 12 trailers hailed and stopped on Friday, July 11, is that correct?

A. That's right.

Q. Could you identify those trailers? And by identify, I mean, can you tell us who owned them?

A. I didn't make any particular record of them. I know there was a D & N.

Q. One?

A. One, and some Harrisons.

Q. Some Harrisons?

A. Yes, and I think some Stone's Express.

[fol. 96] Q. Do you know whether or not the defendant union has any collective bargaining agreement with D & N, Harrison, or Stone's Express?

A. I don't know.

Q. You don't know?

A. No, sir.

Q. Now, Mr. Martin, there are in this operation of trailers on flat cars approximately, I would imagine, the same number of trailers being shipped up from New York as are being shipped out from Yard 5, is that correct?

A. Somewhere around that.

Q. Somewhere around the same vicinity of the total number. Were all of those trailers which were inbound from outside of Boston permitted to be shipped any place

outside of Yard 5 with absolutely no interference from any of the defendants?

A. I don't quite get that question.

Q. Well, let me put it this way: on each of the days in question, Friday, Saturday, and Monday, July 11, 12, and 14, the railroad received from points outside Boston approximately the same number of trailers on inbound flat cars which they would have shipped out in the normal course of events?

A. You mean coming in to be unloaded?

Q. That's correct.

A. We received a number.

Q. And were those unloaded and driven from Yard 5?

A. They were.

Q. Was there any interference of any nature by the defendants to prevent those trailers from being unloaded or taken out of Yard 5?

A. None on the inbound.

Q. Absolutely no interference with all of those trailers which came from outside Boston?

A. That's right.

Q. Now, all of those trailers which were inbound from points outside Boston—they were driven from Yard 5 by employees of the New England Transportation Company, is that right?

A. Driven from the yard?

[fol. 97] Q. That's correct.

A. No, sir.

Q. Then some of them were driven by employees of the New England Transportation Company?

A. No, sir.

Q. None of them were?

A. It might be one, but as a general rule, no.

Q. Then they were taken by employees of some other companies?

A. That's right.

Q. Do you know whether or not those employees who took those trailers out of Yard 5 were members of the defendant union?

A. I don't know.

Q. Is it your understanding that all of the truck drivers

who deliver to and from Yard 5 are members of the defendant union?

A. I don't know.

Q. You have no knowledge?

A. No, sir.

Q. I see. Now, again directing your attention, Mr. Martin, to the trailers inbound on flat cars from outside Boston, all of which were permitted delivery without any interference, were those trailers which belonged to employers who also were trying to deliver trailers to that Yard 5?

A. That's right.

Q. In other words, some of the inbound trailers belonged to D & N, to Harrison, to Stone's, to Sears, to Costello, to Pepsi Cola?

A. That's right.

Q. Any and all of those companies?

A. Any of them; I wouldn't say all of them. Some days——

Q. And they had absolutely no interference of any description?

A. None at all.

Q. To your knowledge, were any of these trailers delivered to the railroad on Friday, July 11, without any in-
[fol. 98] terference from the defendant union? And I call your attention to the two in particular, one Costello and one Pepsi Cola.

A. They were delivered without any interference because there was no picket line there.

Q. As a matter of fact, was——

Mr. Burstein: I don't want to interrupt my brother, but it seems to me that if the object of these questions is to demonstrate that there has been no interference with this operation and if the union states that there is no interference and that they have no right or entitlement or intention to interfere, we have got no case, and we will be perfectly willing to withdraw. The only conclusion which can be drawn from this line of inquiry——

The Court: Let him go ahead. I am going to hear this through.

Mr. Burstein: All right, but I would like to be heard on that point.

Mr. D'Arcy: I might answer my brother, your Honor. As a matter of fact, the union is perfectly willing to agree that we have no dispute nor do we have any intention of attempting to interfere with any vehicles coming in from outside Boston nor do we intend to interfere with any vehicles being delivered to Yard 5 of the railroad which do not belong to employers with whom we have collective bargaining agreements.

Mr. Burstein: Now, let me say this, your Honor——

The Court: We aren't getting anywhere and I want to finish this up. We are not going to end up the argument by any agreement which can dispose of this, are we?

Mr. Burstein: I think you are quite right, your Honor.

The Court: Go ahead.

[fol. 99] Q. I think you were about to testify, Mr. Martin, that you saw no picket line in your opinion on Friday or Saturday, is that correct?

A. When these——

Q. At any time.

A. When these were delivered.

Q. I direct your attention to Friday and Saturday.

A. Yes, that's what I am talking about. When these 5 were delivered, there were no picket lines there.

Q. Do you think there was a picket line sometime thereafter?

A. Later.

Q. Then in previously testifying as to what you observed, it is your opinion that that constituted a picket line, is that what you mean?

A. Right.

Q. Mr. Martin, as freight agent of the railroad, has the defendant union ever requested you or, to your knowledge, any railroad executive, supervisor or employee to do anything in connection with this particular activity?

A. No.

Q. They have not requested the plaintiffs then to do anything, to cease doing business or anything else to your knowledge?

A. No, not to my knowledge.

Q. To your knowledge, has all the activity of the defendants been directed to certain employer motor carriers?

A. I couldn't——

Q. And you have been down at the premises and observed their activities.

A. I couldn't answer as to where your endeavors went.

Q. When I say to employer motor carriers, I mean as to whom, not as to where.

A. I couldn't answer that.

Q. Well, have you observed in your presence at Yard 5 that the defendant union and the defendants individually, that their activities were not directed at particular employers or vehicles?

[fol. 100] Mr. Burstein: I object to the form of the question.

The Court: I am going to hear it.

Q. Do you want to have the question read?

A. Yes.

(Last question read by the stenographer.)

The Court: If you can't answer, say you can't answer.

The Witness: I would say they were.

Q. Well, do you mean — I had better rephrase it. On all occasions on July 11, 12, and 14, and upon which you observed activity on the public highways near Yard 5, did you notice that the defendants' activities—and I think you have said they constituted hailing and speaking—were directed at only particular employers?

A. They were.

Q. And they were not directed at several other employers or vehicles, is that correct?

A. That's right.

Mr. D'Arcy: I have no further questions.

The Court: Do you have anything further?

Mr. Burstein: Just one or two questions, your Honor.

Redirect examination.

By Mr. Burstein:

Q. I believe you testified that you had a conversation with Norton and McCarthy on July 11 and on July 14, isn't that correct?

A. That's right.

Q. Didn't that conversation take place on the premises of Yard 5?

A. Just within.

Q. Within Yard 5?

A. Within Yard 5.

[fol. 101] Q. All right. You also testified that on July 14, there were trailers, about 20 trailers inside Yard 5 that were being moved by N. E. T. people?

A. That's right.

Q. And you also testified, did you not, that on July 14 at about 4:30, Norton-McCarthy came into Yard 5, didn't they?

Mr. D'Arcy: Objection, your Honor. I think he is leading the witness.

The Court: Well, I think that's all right. He testified to that.

Q. And there was a cessation of the operation by the N. E. T. men which took place on Yard 5 property?

A. That's right.

Q. While Norton-McCarthy were on Yard 5 property?

A. On the edge of Yard 5 property.

Q. Yes. Now, one final question: there was no interference by Local 25 of trailers moved by flat car from New York City to Boston that you know of, is that right?

A. That's right.

Q. The interference resulted when there were trailers to be moved by flat car from Boston to New York City?

A. That's right,

Mr. Burstein: I have no further questions.

Recross-examination.

By Mr. D'Arcy:

Q. Lest there be any confusion, Mr. Martin, when you testified a moment ago about the defendants being on the edge of the property, you didn't mean to imply that they were on railroad property, did you?

A. That's right, I did.

Q. You did mean to imply they were on railroad property?

A. I did.

Q. I thought you testified earlier that any of their activities were taking place on Northern Avenue outside the railroad property.

[fol. 102] A. Well, when I stepped forward to talk to them, I would be just on the edge of the highway and the New Haven Railroad property. Conversation would be invariably on New Haven Railroad property.

Q. So the only time you saw the defendants on railroad property was in response to an invitation to converse with yourself, and that's all they did when they were on railroad property is talk with you in response to your invitation?

A. I think once there on stopping New England drivers——

Q. Would you answer the question first?

Mr. Burstein: He is answering the question.

The Witness: They stepped on New Haven property in stopping the New England drivers from loading on the Monday, I think.

Mr. D'Arcy: May I move, your Honor, that the witness' answer be stricken? He thinks this took place is what he said.

The Court: I construe think or guess, when they use it that way, to mean to the best of their knoweldge or belief and so on and so forth. For instance, don't you say: I guess I am going to use my driver here. You know darned well you are going to.

Well, let's take the recess here.

(Short recess.)

By Mr. D'Arcy:

Q. Mr. Martin, I think most of my questioning of you has referred to Friday, July 12. Is it fair to say that all the activity which you say on Friday—excuse me, I meant to say the 11th—Friday, the 11th, Saturday, the 12th, and Monday, the 14th, consisted of the same activity on the part of the defendants in hailing and speaking to the drivers of trucks of various motor carriers?

A. And preventing us from doing our normal business.

Mr. D'Arcy: May I move that the answer be stricken, your Honor, and have the question reread and let the witness answer?

[fol. 103] The Court: No, I think not. I construe the answer to mean that he says yes to your question and in addition to that, that is what he stated.

Let me have the answer.

(Last answer read by the stenographer.)

Q. Then your answer is, Mr. Martin, yes, all you saw the defendants do was hail and speak to these drivers of various trucks, and you construe that that prevented the normal business operation?

A. It did.

Q. But all you saw them do was hail and speak, is that correct?

A. That's right.

Mr. Burstein: I have no further questions, your Honor.

Mr. D'Arcy: I am not through yet, just a minute. I was just conferring here.

Mr. Burstein: I'm sorry.

Q. Mr. Martin, again directing your attention to the hailing and speaking which you saw, all this activity took place on Northern Avenue, the public highway, is that correct? I think that is what you so stated.

A. That is what I stated.

Mr. D'Arcy: Thank you.

No further questions.

Mr. Burstein: I have one question.

Further redirect examination.

By Mr. Burstein:

Q. In addition to the hailing and the stopping which you described, you also saw that the defendants' activities made [fol. 104] it impossible for the railroad to perform the flat-car service which it normally provided for shippers and motor carriers, is that correct?

A. That's correct.

Mr. Burstein: I have no further questions.

Further recross-examination.

By Mr. D'Arcy:

Q. As a matter of fact, Mr. Martin, did you see that that is what happened or is that what happened?. Is it a fact that the railroad did not ship on these 3 days trailers which belonged to various motor carriers but that they did ship and were not in the least bit interfered with in trying to ship the trailers belonging to certain other motor carriers?

A. Not motor carriers.

Q. Motor carriers or any other kind of shipper that was sending trailers on flat cars.

A. Different shippers.

Q. Any shipper that was trying to send trailers on flat cars which were already loaded.

A. We were interfered with so far as motor carriers were concerned.

Q. And the only interference was with certain specific motor carriers, is that correct?

A. All motor carriers.

Q. Is it safe to say that what you observed at Yard 5 shows that certain trailers belonging to people using the railroad services were permitted to be brought into the yard and loaded without any interference?

A. Not motor carriers.

Q. Well, I am not asking you about motor carriers. I am asking you about trailers which were being shipped on this trailer-on-flat-car service. Some of those were permitted to go without any interference, is that correct?

A. Two trailers not operated by motor carriers were allowed to be loaded.

Q. Well, why do you distinguish between trailers not operated by motor carriers?

A. Because you are asking the question.

[fol. 105] Q. What difference does it make in your mind?

A. I am giving you your answer to the question that you give me.

Q. I asked you the question and I ask it again now so that there shall be no question about it. We are talking about trailers which were being shipped on this trailer-flat-car

service. Were some of those trailers permitted to be shipped without any interference by the defendants or the defendant union?

A. Two were.

Mr. D'Arcy: Thank you.
That's all.

Mr. Burstein: I have no further question, your Honor.

(Witness excused.)

Mr. Burstein: Mr. Mahoney, please.

JAMES P. MAHONEY, Sworn.

Direct examination.

By Mr. Burstein:

Q. Will you please state your full name and home address?

A. James P. Mahoney, 47 Elmcrest Road, Wakefield, Massachusetts.

Q. You are employed by the New Haven Railroad?

A. That's right.

Q. How long have you been employed by the railroad?

A. About 2½ years.

Q. Mr. Mahoney, prior to your employment with the New Haven Railroad, what occupation or profession were you engaged in?

A. I was a police officer.

Q. Employed by the Commonwealth of Massachusetts?

A. For 20 years.

[fol. 106] Q. Mr. Mahoney, were you at Yard 5 on July 14, 1955?

A. I was.

Q. At or about 3 p. m.?

A. I was.

Q. Now, will you tell the Court in your own words exactly and precisely what you observed at that time? Advise his Honor who was present at the time, the activities of the parties, and everything which bears on your observation.

A. Well, at about 3:15-4:15, Daylight Time, I was standing near the shanty which is referred to here as the caboose and I saw two cars drive up to about opposite the trailer platform on Northern Avenue and stop there. Several men got out of those cars and came around on to railroad property and flagged down a tractor hauling Stone's Trailer No. 171. One of these men, Norton, stepped up on the running board on the driver's side and, I presume, talked with the driver; whereupon, the driver circled off the railroad property and went west on Northern Avenue.

Q. Now, Mr. Mahoney, look at Plaintiff's Exhibit No. 2, the photograph there before you. Can you indicate to his Honor approximately where this activity you just described occurred, namely, the running by Norton on to the property of the New Haven Railroad and the stopping of the Stone's Trailer 171?

A. It doesn't show it here.

Q. It doesn't show it there. Did you have a conversation with either Norton or McCarthy?

A. I did not.

Q. Now, how many people did you see get out of an automobile?

A. Four or five. I wouldn't know specifically.

Q. And you say they ran in the direction of Stone's Trailer 171?

A. Which was coming in, that's right?

Q. And was Stone's Trailer 171 then on Yard 5?

A. When——

Q. The property of the railroad.

A. When it stopped, yes.

Q. And that time, Norton got on the running board?

A. That's right.

[fol. 107] Q. And thereafter the trailer turned around and left?

A. That's right.

Q. How long did you stay on Yard 5?

A. Well, I was in the general vicinity until about 9 p. m.

Q. Did you speak to anybody after that occurrence?

A. Anybody?

Q. Yes. Did you speak to anybody about this fact that you observed——

A. Yes, I talked to the man I was with.

Q. Who?

A. Captain Fiebel.

Q. Captain Fiebel?

A. Captain Fiebel of the railroad police. We were together.

Q. Did he say anything at the time?

A. He made notes.

Q. He made notes. Did he speak with any of the 4 men who came to the Stone's trailer?

Mr. D'Arcy: Who is this?

Mr. Burstein: Captain Fiebel.

Q. Now, is there anything else you observed or noted or any conversation that you had which related to or bears upon the stoppage of trailers in the railroad's yard?

A. Just this: I saw McCarthy on railroad property direct a trailer driver to haul out that Harrison trailer that was parked against the platform.

Q. And bring it on to Northern Avenue?

A. That's right.

Q. Did you hear Mr. Martin testify that on July 14 he observed 3 Harrison trailers on the property, Yard No. 5, that thereafter he went in to make a telephone call, and when he returned he found the Harrison trailers on Northern Avenue? Did you hear that testimony?

A. I did.

[fol. 108] Q. Now, is the trailer to which you refer one of the Harrison trailers alluded to by Mr. Martin in his testimony?

A. I would have to assume. I don't know that for a fact.

Q. You don't know that?

A. That's right.

Q. Is that all you observed that day?

A. That's right.

Q. Did you notice any people walking about the property, any of the defendants, either adjacent to or abutting Yard No. 5?

A. Well, they were moving about and talking together.

Q. It was not a patrol?

A. Not a patrol.

Q. Did you notice whether or not any trucks coming

own Northern Avenue in the direction of the yard were eing stopped?

A. Except that one, no.

Q. And that was your sole connection with the incident?

A. That's right.

Mr. Burstein: I have no further questions, your Honor.

Cross-examination.

By Mr. D'Arcy:

Q. Mr. Mahoney, I gather from your testimony that you vere employed by the New Haven Railroad, is that correct?

A. That's correct.

Q. Could you tell us in what capacity you were employed y the railroad?

A. Well, I am a special investigator in the protection ervices.

Q. You are a special investigator in the protection serv-ces?

A. That's right.

Q. Are you uniformed?

A. No, sir.

[fol. 109] Q. You are what might be called a plainclothes nvestigator?

A. You could say that.

Q. Now, you have testified that the only incidents of any ctivity which you observed in the vicinity of Yard 5 was n Monday, July 14, at approximately 4 p.m.

A. 4:15, that's right.

Q. That is the only observation you had of any activity?

A. That's right.

Q. In this case?

A. That's right.

Q. You testified that while you were there at approxi-mately 4:15, you saw a car drive up to Yard 5, is that right?

A. Two cars.

Q. Two cars?

A. That's right.

Q. Did you recognize the cars?

A. I did not.

Q. You had never seen them before?

A. That's right.

Q. Do you know who got out of those cars? You said, I believe, 4 or 5 men.

A. That's right.

Q. And you said that they ran to a particular trailer?

A. That's right.

Q. All of them?

A. Yes.

Q. All 4 or 5?

A. Four or five people.

Q. Four or five people?

A. That's right.

Q. Messrs. Norton and McCarthy?

A. That's right.

Q. You know them from long-time experience?

A. No, I didn't know them before that day. I hadn't seen them before that day.

[fol. 110] Q. How did you identify them on that particular day?

A. Captain Fiebel, who I was with, had talked with them on Friday and he knew them.

Q. So you think that Messrs. Norton and McCarthy ran up to the Stone's Express trailer because Captain Fiebel told you who they were?

A. That's right.

Q. I think you said that you saw them order the truck away or divert or direct or something?

A. No. I said that Norton stood up on the running board on the driver's side, and after he got down, the driver made a left circle out back on to Northern Avenue and headed west.

Q. So that, to your knowledge, Mr. Norton spoke with the driver of the vehicle?

A. I presume he did.

Q. Thereafter, the driver left the premises?

A. That's right.

Q. You didn't see Mr. Norton make any gesticulations or any threatening gestures at the driver?

A. That's right.

Q. All you saw is that they were talking to each other?

A. That's right.

Q. And it's only the one truck that you saw involved?
A. That's right.
Q. On that particular occasion?
A. That's right.
Q. You testified, Mr. Mahoney, I believe, that you saw one of these defendants talking to a New England Transportation Company employee?
A. No, I didn't.
Q. Concerning the Harrison truck?
A. No, I don't know who it was.
Q. You saw him talking to somebody?
A. I saw him direct this way (witness indicating with hand): "Back in there and get the hell out of here." That's what he said.
[fol. 111] Q. You heard him say that?
A. That's right.
Q. You heard him speak. You don't know who he spoke to?
A. The driver of the truck. I don't know who it was.
Q. Then the driver took the particular vehicle outside the yard?
A. That's right.
Q. At the time you were about the premises of Yard 5, Mr. Mahoney, did you see any persons patrolling along the highway abutting the employer's premises?
A. Patrolling, no.
Q. Did you see any persons marching back and forth in more or less close formation?
A. No.
Q. Did you see any persons obstruc-ing passage to those entering or leaving the premises?
A. Except that one case.
Q. You would say that one case was obstructing passage?
A. That's right, because they ran toward it as it came in the yard, and it stopped.
Q. They ran toward it?
A. That's right.
Q. They were not in front of it?
A. That's right.
Q. They were in no way physically impeding the movement of that vehicle?

A. That's right.

Q. They ran and shouted at the driver?

A. Well, they ran out there. I didn't hear any——

Q. And the driver stopped then?

A. That's right.

Q. You don't know whether the driver stopped of his own volition or whether they stopped him?

A. That's right.

[fol. 112] Q. You didn't hear the conversation?

A. That's right.

Q. Would you say that in your opinion any of the activity which you saw about Yard 5 around 4:15 on July 14 impeded any free and uninterrupted travel along the public way?

A. I could not say it did; I would not say it did.

Q. Your answer is no?

A. No.

Q. How many persons did you see participating in any activity?

A. Well, I saw that group, 4 or 5, and I saw those people at different times talking together. I didn't see them——

Q. Talking among themselves?

A. Talking among themselves, yes, and with truck drivers or I presume truck drivers, men who came up and talked with them.

Q. Very likely members of their union?

A. Possibly.

Q. Did you notice anything in the character or their demeanor which would have been sufficient to induce breach of the peace, since you have been a police officer for several years and certainly are familiar with what activity might induce breach of the peace?

A. I wouldn't say; I would say no.

Mr. D'Arcy: No further questions.

Mr. Burstein: Just a few questions.

Redirect examination.

By Mr. Burstein:

Q. Based on your experience as a police officer—and now you have been qualified as an expert on criminal law—

would you say that a man who runs on another man's property is guilty of a violation of the law?

A. Not unless he was warned off or the property was posted.

[fol. 113] Q. So you thought that McCarthy and Norton had the right to come on to the property to stop trucks in the premises?

A. No, sir.

Q. All right. Now, based on your experience as a police officer and your knowledge now of criminal law, the civil law, would you say that a person who comes upon the property of a railroad to stop the railroad from doing business and transporting merchandise in commerce is committing a breach of the peace?

A. Put that way, yes.

Mr. Burstein: That's all.

Recross-examination.

By Mr. D'Arcy:

Q. Mr. Mahoney, did anybody, including yourself, ask Mr. Norton not to speak to this driver on the railroad property?

A. No.

Q. You made no mention of it although it was your duty as a protector of the railroad's property to speak to Mr. Norton and order him off if you felt he was a trespasser?

A. I would have to make a little lengthy answer to that, if you will permit me. From where I stood, I was perhaps 75 to 100 feet from where this incident occurred, and before I could have gotten there, had I started, the incident was over.

Q. So that it was an incident which was minute in point of time?

A. That's right.

Q. Any possible trespass upon the railroad property was minute in point of time?

A. In point of time, yes.

Mr. D'Arcy: No further questions.

Mr. Burstein: I have no further questions, your Honor.

(Witness excused.)

Mr. Burstein: Mr. Benkoski.

[fol. 114] MICHAEL A. BENKOSKI, Sworn.

Direct examination.

By Mr. Burstein:

Q. Would you please state your full name and your home address?

A. Michael A. Benkoski, 89 Fourth Street, East Cambridge.

Q. By what company are you employed?

A. Stone's Express.

Q. In what capacity are you employed by Stone's Express?

A. Truck driver.

Q. And how long have you been so employed?

A. Thirty-four years.

Q. By Stone's Express?

A. That's right.

Q. And are you now a member of the International Brotherhood of Teamsters and Chauffeurs, Local 25?

A. I am.

Q. And how long have you been a member of Local 25?

A. Oh, since 1919.

Q. Since 1919?

A. That's right.

Q. And in the course of your duties as a driver, do you drive a tractor-trailer unit?

A. I do.

Q. And in the course of your duties, Mr. Benkoski—is it Benkoski?

A. Benkoski.

Q. —do you have occasion and is it part of your duties to drive trailers to Yard 5 of the New Haven Railroad?

A. Yes, sir.

Q. And how frequently, sir, during the course of a week do you drive trailers to Yard 5?

A. Well, about 2 or 3 times during the week, and Saturdays I put in the whole day over on Northern Avenue.

[fol. 115] Q. So the Court may have this clearly, during the week, that is, Monday to Friday, you have occasion on 2 or 3 days to deliver trailers to Yard 5, and those trailers are transported on flat cars?

A. That's right.

Q. And how long have you been doing that, Mr. Benkoski?

A. Oh, a good many years.

Q. At least for 10 years, isn't that so?

A. Easy, yes.

Q. And would this be a fair description of your duties on those 2 or 3 days and on all day Saturday: you would drive a tractor-trailer unit to Yard 5, where the trailer would be disengaged from the tractor and the trailer would then be loaded onto a flat car for delivery to New York or some other point, is that correct? Is that a correct statement of your duties?

A. Yes, sir.

Q. And you do that regularly?

A. Yes, sir.

Q. Now, remembering this 10-year period—and I am not asking you to go beyond that because it's difficult for any of us to remember beyond that—but during this 10-year period up until July 11, 1952, you did exactly what you are now describing to the Court, brought the tractor-trailer unit into the yard, disengaged it, put the trailer on a flat car, and off it went?

A. I didn't put it on a flat car.

Q. Well, I mean it was put on a flat car?

A. Yes, sir.

Q. And up to July 11, did anybody ever stop you from doing that?

A. No, sir.

Q. That was perfectly all right, wasn't it?

A. Yes, sir.

Q. And you were happy about that, too, weren't you?

A. Yes, sir.

Q. And you didn't want to stop doing that, did you?

A. No, sir.

[fol. 116] Q. And you worked a full week and you received pay for that week, didn't you?

A. Yes, sir.

Q. Now, on July 11, did you have as part of your duty the driving of a tractor-trailer unit to Yard 5, on Friday, July 11?

A. Not Friday, no.

Q. What day——

A. On Saturday.

Q. Is that July 12, Saturday?

A. Yes, sir.

Q. Now, will you tell the Court what happened on July 12? Let's start with the beginning of the day. Where do you report in the morning?

A. At East Cambridge.

Q. And there is a terminal there, is there?

A. Yes, sir.

Q. And you get to your tractor-trailer unit?

A. That's right.

Q. And then you get into the unit and you start driving it down towards Yard 5, is that it?

A. Yes, sir.

Q. Now, at about what time did you leave the East Cambridge terminal going in the direction of Yard 5?

A. About 8 o'clock.

Q. About 8 o'clock. And about what time did you reach the vicinity of Yard 5?

A. It must have been about 25 minutes past.

Q. About 25 minutes past 8?

A. That's right.

Q. Now, will you tell the Court in your own words, giving us all the facts—strike that, please.

Mr. Benkoski, you haven't spoken to me before your appearance in this court?

A. That's right.

Q. You don't know me, do you?

A. No.

Q. Never met me before?

A. No.

[fol. 117] Q. I didn't discuss this case with you, did I?

A. No, sir.

Q. Now, will you tell the Court in your own words everything that happened from the minute that you got into the vicinity of Yard 5 and for the rest of that Saturday?

A. Well, I approached Yard 5.

Q. Speak up.

A. I approached Yard 5 and I was stopped by Mr. McCarthy.

Q. Where were you stopped by Mr. McCarthy?

A. On Northern Avenue.

Q. On Northern Avenue?

A. Yes, sir.

Q. Now, tell the Court exactly how far you were from the entrance, the normal place where you enter Yard 5, when you were stopped by Mr. McCarthy?

A. Well, just before I entered.

Q. You were just ready to get in the yard, right?

A. Just before I entered.

Q. Now, tell the Court what Mr. McCarthy did and what he said to you.

A. He says to me, "There's nothing going out," so I says, "Why?" He says, "There's a dispute with some of the owners and yours included." So I says, "What am I going to do?" He says, "Go back." So I took it as far as the fan yard and I called up my boss and told him the predicament I was in. So he says, "Stay there," so I stayed there until he arrived.

Q. Then what happened?

A. My boss went over and talked with McCarthy. I don't know what they talked about. So McCarthy says, "You can take the trailers out." So the boss says to me, "Well, you can drop that and start taking the ones out." So I hooked on to one——

Q. Wait a minute. Now, when the boss told you that you could take the trailers out, you unhooked the tractor from the trailer which you had originally brought in in the morning and left the trailer outside Yard 5?

A. No, at the fan yard.

[fol. 118] Q. That isn't Yard 5, is it?

A. No—maybe it is.

Q. But that isn't the place where you normally deliver for loading on flat cars?

A. That's right.

Q. And then you took the tractor into Yard 5 and hooked it on to another trailer that came in from New York?

A. That's right.

Q. Was it an empty?

A. Yes.

Q. And then you brought the trailer back to East Cambridge?

A. That's right.

Q. What else did you do?

A. I was going to pull more but there was no room for more. The yard was full of trucks.

Q. Whose trucks?

A. Stone's Express.

Q. You mean your own yard was full of trucks?

A. Yes.

Q. Is that all you did the rest of the day Saturday?

A. I came back and hung around.

Q. Didn't you make any deliveries to Yard 5?

A. No, sir.

Q. Now, did you tell us everything about your conversation with McCarthy, what you said and what he said?

A. Yes, sir.

Q. Fine. Now, on July 14, did you try to go to Yard 5?

A. Was that Monday?

Q. Yes.

A. No, sir.

Q. How about Tuesday?

A. No, sir.

Q. And the only time that you spoke with McCarthy was on July 11?

A. On Saturday, yes, sir.

Q. And so that we have this clear, from the very first day that you started as a member of Local 25 and as an [fol. 119] employee of Stone's Express to drive tractor trailer units to Yard 5 for detachment and shipment of the trailers by flat car, you were never interfered with except on July 11, is that right?

A. That's right.

Q. And that was the first you ever heard about it?

A. That's right.

Q. Incidentally, Mr. Benkoski, you are a pretty good union member, aren't you?

A. I hope to be.

Q. I know you are. And I take it that you attend meetings from time to time with the union?

A. I do.

Q. And of course you exercise your right to elect your delegates?

A. That's right.

Q. And you are interested in union affairs?

A. Yes, sir.

Q. Do you know whether or not any meeting was called of the members of the union to discuss this problem?

A. That I couldn't tell you.

Q. Did you ever receive notice from the union that the fellows wanted to talk about this business of trailers on flat cars?

A. No, sir.

Q. Did anybody ever tell you that you oughtn't operate that trailer?

A. No, sir.

Q. Nobody?

A. No, sir.

Q. Did the president ever say to you: Benkoski, we want to stop this business?

A. No, sir.

Q. That first time you heard about it was on July 11, isn't that right?

A. Yes, sir.

Q. Did you ever see anything in the publications of the union about it?

A. No, sir.

Q. Receive any letter?

A. No, sir.

[fol. 120] Q. Were you told about it at the last meeting you attended?

A. No, sir.

Q. When was the last meeting you attended?

A. Oh, I ain't very good at meetings, but I should say about a year ago.

Q. About a year ago. But you speak to other members of the union?

A. Yes, sir.

Q. Did any members of the union ever tell you that the union had a dispute and they weren't going to——

A. No, sir.

Q. So as far as you know, there was never any trouble about this, isn't that so?

A. That's right, yes.

Q. Your answer is no?

A. Yes.

Q. And you never heard any argument or dispute about that?

A. No, sir.

Q. I just want the record to be clear that you are a member in good standing in the union.

A. That's right.

Q. And you are not here to help anybody, is that right?

A. That's right.

Q. And you are just here to tell the truth to the Court?

A. Yes, sir.

Mr. Burstein: Your Honor, I want to make that clear because this man is a member of the union and I owe him a responsibility to say this. This man is here only in response to a subpoena. He did not voluntarily appear, and he is not here either in response to the union or my response except by reason of the fact that we have subpoenaed him and compelled his attendance here. He is here by compulsion rather than by voluntary desire.

Q. That is correct, isn't it?

A. Yes, sir.

Mr. Burstein: I have no further questions.

[fol. 121] Cross-examination

By Mr. D'Arcy:

Q. Mr. Benkoski, you have testified that you have been a member of Local 25 of the Teamsters Union for many years?

A. Yes, sir.

Q. Is that correct?

A. Yes, sir.

Q. You have been engaged as an employee of Stone's Express in driving trailers down to Yard 5 of the railroad for delivery upon the flat-car operations, so-called, is that correct?

A. Yes, sir.

Q. Those are not all of your duties, are they?

A. No, sir.

Q. Have you ever heard of any conversation—and I believe you have testified to this—that the union had a dispute with the railroad company about this trailer operation?

A. No, sir.

Q. Have you heard from the union members or from the agents that the membership is very much dissatisfied with the lack of employment brought about as a result of shipping trailers in other methods than by driving them?

A. Well, I don't know how to say that.

Q. Well, let me simplify the question.

Mr. Burstein: Did he say no? I want to get an answer to that question.

The Witness: No.

Mr. Burstein: All right. He has answered your question.

Q. You have never heard any member of the union complain about the unemployment problem of members of the union?

A. Oh, there's a lot that's loafing that are complaining they are out of work. I have heard that much.

Q. Have you ever heard any complaints as to why particular members are out of work? And at this point I should like to direct your attention to the difference between what they call over-the-road and city men.

[fol. 122] A. Well, we laid off a lot of our members on account of lack of business.

Q. Over at Stone's Express?

A. Yes.

Q. When you say lack of business, does that mean lack of freight to ship or does that mean that since Stone's Express is now shipping so many trailers by other than over-the-road methods—

A. No, I don't mean that. I mean the business dropped off at the New Haven tree house. We still continued the pickup and delivery service but the volume of the business dropped and naturally they had to lay off.

Q. As a matter of fact, does this so-called trailer-flat-car operation deprive members of the union of employment?

A. Not as far as the one I am mentioning.

Q. I beg your pardon?

A. Not the tree house district, where they have nothing to do with it.

Q. They have nothing to do with it?

A. It's a different business.

Q. If the trailers were not shipped on flat cars, how, in your opinion and from your experience as an employee of Stone's, would they be transported?

Mr. Burstein: Your Honor, I submit that is the grossest kind of unethical question.

The Court: I am going to hear everything.

Go ahead.

Mr. Burstein: All right, your Honor.

The Court: You are not imposing on this fellow in any way, are you? Is anybody imposing on this fellow? He's a pretty good man.

Mr. Burstein: No, we are not imposing. It's all right if your Honor wants it.

[fol. 123] Mr. D'Arcy: May we have the question again?

(Last question read by the stenographer.)

The Witness: Well, by flats—I didn't quite get that one.

The Court: If you don't know the answer, just say so.

Q. You don't know. Is that the answer?

A. I don't know.

Q. Now, Mr. Benkoski, when you delivered a particular trailer or were about to deliver a particular trailer to Yard 5 on the sole date in question in which you were concerned, you testified that you were stopped by Mr. McCarthy, is that correct?

A. Yes, sir.

Q. When you say you were stopped, how were you stopped?

A. He flagged me down, put his hand up.

Q. He waved to you?

A. Put his hand up.

Q. Have you ever seen Mr. McCarthy in other places in the city and on other roads wave to you in the same manner?

A. I have.

Q. Have you stopped?

A. If he wanted me to, I would. Sometimes he would give a gesture: how are you, or something.

Q. So you stopped as a response of his wave to you?

A. No. He put his hand up for me to stop. It wasn't a wave.

Q. Where was he standing? Was he standing in front of the truck or on the side as you were about——

A. I was just making a right turn and he was on my left.

Q. He was not physically impeding the truck from going forward?

A. No, sir.

Q. He then spoke to you?

A. Yes, sir.

Q. And told you that there was a dispute?

A. No——

[fol. 124] Q. Go ahead and tell us.

A. He says, "There's nothing going out," so I says, "Why?" He says, "There's a dispute between the owners and your concern also."

Q. There's a dispute between the union and your owners?

A. The owners.

Q. Your owner?

A. The owners and your outfit, too. So I says to him, "What shall I do with it?" He says, "Take it back."

Q. He in no way threatened you in regard to this particular conversation?

A. No, sir.

Q. Now, Mr. Benkoski, for the period of time which you were there at Yard 5, did you notice any persons patrolling along the highway abutting the employer's premises?

A. No, sir.

Q. Did you notice any people marching back and forth in more or less close formation?

A. No, sir.

Q. Did you notice anyone obstructing passage to those entering or leaving the premises?

A. I didn't notice.

Q. Did you notice anybody impeding free and uninterrupted travel along the public way, Northern Avenue?

A. No.

Q. Now, you also testified that when you, as a result of your conversation with Mr. McCarthy, called your boss and told him that you could not deliver the flat car, that the boss told you to wait until he came down?

A. That's right.

Q. The boss then did come down and spoke with Mr. McCarthy?

A. That's right.

Q. And Mr. McCarthy advised the boss that the union had a dispute with him?

A. I don't know. I didn't hear it.

Q. You didn't hear it?

A. No, sir.

[fol. 125] Q. The boss then asked if there was any objection by the union to taking out any trailers which were already in the yard?

A. Well, I didn't——

Q. Those which had come on from New York?

A. I didn't hear him ask that, but I was told I could take them out.

Q. By the boss?

A. By Mr. McCarthy.

Q. Did you ask Mr. McCarthy if there was any dispute about any boxes or trailers which were already in the yard?

A. No, I didn't.

Q. Why did you ask Mr. McCarthy if you could take back any trailers?

A. I didn't ask him.

Q. Who did?

A. He is the one that told me we could take the inward but we couldn't drop nothing there.

Q. In other words, any of the trailers which had come up on flat cars from places other than Boston could be trans-

ported as far as the union was concerned. They had no dispute concerning those particular trailers?

A. No, sir.

Q. Now, Mr. Benkoski, you have been an employee of Stone's for a long time and you have been a member of the union for a long time.

A. Yes, sir.

Q. That's correct: Does the union have a collective bargaining agreement with Stone's Express covering the conditions of employment, the hiring and tenure of employment for employees engaged in driving the trucks for Stone's Express?

A. I think so.

Q. You don't know of your own knowledge?

A. Well, I think they have.

Q. Did you attend a meeting upon which they voted to ratify the agreement?

A. No, I didn't.

Q. You didn't attend it?

A. No.

[fol. 126] Q. But you do believe they have an agreement with Stone's?

A. Yes, sir, I think so.

Mr. Burstein: We will concede they have an agreement.

Mr. D'Arcy: Thank you.

Q. Were you at one time employed as what they call an over-the-road driver for Stone's Express?

A. Yes, sir.

Q. In the course of that employment, you used to make regular trips to and from Boston and New York and any other places to which you might be assigned?

A. Yes, sir.

Q. Is that part of your present occupation?

A. No, sir.

Q. You don't do any of the road driving at present, do you?

A. If you call going to Haverhill——

Q. To Haverhill?

A. That's right.

Q. But you don't do what they call over-the-road from Boston to New York?

A. Not for some years.

Q. When did that stop?

A. About 7 or 8 years ago.

Q. Do you know why your employment changed from over-the-road operation to the now local operation?

A. I was getting too old for it.

Q. You were getting too old?

A. Yes, sir.

Q. Did anybody take your place as an over-the-road driver at that particular time?

A. Oh, there was a replacement, yes, sir.

Q. And that replacement then drove the trucks over the road?

A. Yes, sir.

Q. Do you recall approximately when that was?

A. Oh, about 7 or 8 years ago.

[fol. 127] Q. About 7 or 8 years ago?

A. That's right.

Q. Has that particular employee who replaced you on the over-the-road operation been employed at Stone's?

A. Yes, sir.

Q. Is he still employed with Stone's?

A. Yes, sir.

Q. What is the nature of his occupation now?

A. Road driver.

Q. He is still a road driver?

A. Yes, sir.

Mr. D'Arcy: No further questions.

Mr. Burstein: No questions. Thank you.

(Witness excused.)

Mr. Burstein: I think I have one more witness and that will be the end of our case, your Honor.

The Court: All right.

Mr. Burstein: I don't propose to add cumulative testimony. I would like to state on the record that we have about 8 more witnesses here whose testimony would be purely corroborative, and I see no point in burdening your Honor or the record.

Now, Mr. Jenkins, please.

EDWARD F. JENKINS, Sworn

Direct examination

By Mr. Burstein:

Q. Would you please state your full name and home address, sir?

A. Edward F. Jenkins, 399A West Broadway, South Boston.

Q. What office do you hold in the defendant union?

A. President and business agent.

[fol. 128] Q. And how long have you held the office of President of Local 25?

A. Approximately two and a half years.

Q. Now, prior to that time, you were a business agent for Local 25?

A. Yes, sir.

Q. For how long a period of time, Mr. Jenkins?

A. Three years.

Q. Three years. Prior to that time, you were an employee of Local 25?

A. Yes, sir.

Q. And were you at any time a member of the negotiating committee or the wage stabilization committee of the union prior to your election as president?

A. Yes, sir.

Q. And in what year was that, sir?

A. Many years.

Q. Many years. So far as you remember, you were always on the wage stabilization committee in negotiating contracts with teamsters in this area, is that correct?

A. More or less.

Q. As president of the defendant union, you have certain duties which are set out in your constitution and bylaws, isn't that so, Mr. Jenkins?

A. That's right.

Q. And would you tell the Court very briefly what those duties are?

A. My particular duties?

Q. Yes, as president.

A. My particular duties are to handle grievances, conduct all meetings, assign all committees, and any business pertaining to the affairs of Local 25.

Q. Now, with respect to that portion of your duties which relate to the handling of grievances, would it be correct to state that in the discharge of that duty, you would handle a grievance in the manner provided for in your collective bargaining agreement? You would be guided by your collective bargaining agreement in the handling of grievances?

A. That's right.

[fol. 129] Q. As a matter of fact, your collective bargaining agreement has a fairly elaborate setup for handling grievances?

A. I wouldn't call it elaborate but we do have a procedure.

Q. Now, the union has a constitution and a set of bylaws, does it not?

A. That's right.

Q. Do you have a copy of those in the court room?

A. I do not.

Mr. Burstein: I should like to say, your Honor, that we have served a subpoena and subpoena duces tecum asking for the constitution and bylaws but I understand that perhaps the subpoena duces tecum wasn't served, and I would like to reserve the right, however, to have those documents produced because we may want to have reference to them. But I won't further press the point.

Q. Would it be fair, or would it be correct to state that your union has jurisdiction over drivers and helpers employed by motor carriers in the Boston, Massachusetts area?

A. That's right.

Q. And would it be correct to state, Mr. Jenkins, that your union has collective bargaining agreements and has had collective bargaining agreements with motor carriers who operate out of the Boston, Massachusetts area?

A. That's right.

Q. And I take it that you also have agreements with certain private carriers, namely, shippers who operate their own fleets of trucks? Would that be correct?

A. That would be correct.

Q. Now, so that we have the divisions clearly in mind, there are shippers who transport their own merchandise, and those shippers are called private carriers. Isn't that right?

A. That's right.

Q. And they employ drivers and helpers who are members of Local 25?

A. That is right.

Q. And in those instances, you have a collective bargaining agreement of substantially the same kind as you have with motor carriers?

[fol. 130] A. Yes, not negotiated individually but generally taken care of by the motor carriers group.

Q. So that the type of contract which exists in the instance of motor carriers is pretty much the form of agreement wherever Local 25 drivers and helpers are employed in this area?

A. I would say yes.

Q. Thank you. Now, to the best of your knowledge, does Local 25 now or has Local 25 at any time in the past had a contract with the railroad, the New Haven Railroad?

A. Never to my knowledge.

Q. And to your knowledge, Mr. Jenkins, has Local 25 at any time represented any of the employees of the railroad?

A. Directly, the railroad directly?

Q. Yes.

A. I would say no.

Q. Those employees, to the best of your knowledge, are Railroad Brotherhood Employees, aren't they?

A. That's right.

Q. Now, you testified before that you have always participated in the negotiation of collective bargaining agreements with truck operators and private carriers in this area, isn't that right?

A. I said over a period of years.

Q. Over a period of years?

A. Yes, not always.

Q. Yes. I just want to get this one thing clear: you are familiar with this service which we call trailer-on-flat-car service, that has been described here as trailer-on-flat-car service?

A. Not too familiar because it's not my department.

Q. It's not your department. But you have some general idea of what it consists?

A. I have an idea.

Q. And to your knowledge, your best recollection or knowledge, how long has that service been provided in this area?

A. I would say since about 1938.

[fol. 131] Q. Since 1938, fine. Now, to come back to this matter of the collective bargaining conference, would it be fair to state and correct to state that the procedure and practice of the union in negotiating a collective bargaining agreement is to set up a committee which is called the wage stabilization commitee?

A. Wage scale committee.

Q. Wage scale committee. And then that wage scale committee sets up certain proposals?

A. Right.

Q. And then those proposals are submitted to the employers either individually or to their representatives?

A. Right.

Q. Is that correct? And those proposals are in writing, aren't they?

A. Right.

Q. And in 1946, were you a member of the wage scale committee?

A. Yes.

Q. And I take it, therefore, that you were one of the gentlemen who helped the union formulate its proposals for the new contract?

A. Yes.

Q. Now, Mr. Jenkins, I show you a document called "1946 Proposal," and I ask you: is this, to the best of your knowledge, a copy, a correct copy of a proposal submitted by the wage scale committee of the union to the employers in advance of the negotiations of the 1946-47 contract?

A. My answer would be yes.

Mr. Burstein: Your Honor, I respectfully offer that in evidence.

Mr. D'Arcy: No objection.

(A document entitled, "1946 Proposal," marked Plaintiff's Exhibit No. 3.)

Q. Now, Mr. Jenkins, following the submission of these proposals which you assisted in drafting, I take it that you had collective bargaining conferences with the em-[fol. 132] ployers and you finally arrived at an agreement?

A. Right.

Q. Now, Mr. Jenkins, I show you a document marked "1946-47 Agreement," and would you tell the Court whether this is a true copy or a substantially accurate copy of the agreement negotiated and entered into between the union and the employers in this area in the year 1946-47?

A. I would say yes.

Mr. Burstein: May I offer this in evidence?

The Court: Mark it.

(A document entitled, "1946-47 agreement," marked Plaintiff's Exhibit No. 4.)

Q. Now, Mr. Jenkins, will you search your recollection —and I know this goes back a number of years and you have had a lot of work in the meantime—and do you recall whether or not prior to the negotiations of the 1946 contract there was some discussion by the union with respect to this flat-car service? Do you recall that?

A. Yes, I recall that.

Q. Well now, let me help refresh your recollection.

Mr. Burstein: And I respectfully call your Honor's attention to Article VII of Plaintiff's Exhibit No. 3 in evidence, which appears on Page 4 thereof, and with your Honor's permission, I should like to read a portion of that article. Article VII is a proposal to be incorporated in the new agreement. It reads as follows:

"It is agreed that employers will not engage other equipment while they have available equipment of their own. When necessary to hire equipment, it is agreed that in order to assist in giving employment to members of Local 25 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America and/or to reduce the idle equipment burden of those employers signatory hereto, that such employers shall hire

said equipment as follows: from employers likewise signatory to this agreement when such employers are able to [fol. 133] furnish said equipment. Movement by rail 'flat car' cannot be used while employers have available equipment of their own."

Q. Now, Mr. Jenkins, do you recall this proposal having been made in 1946?

A. What was the question again.

Q. Do you recall that proposal having been made by the union as one of the demands of the union when it negotiated a contract with the employers in 1946?

A. I have a faint recollection.

Q. Yes, sir. Does that help refresh your recollection?

A. Yes.

Q. Now, Mr. Jenkins, I show you Plaintiff's Exhibit No. 4 and I call your express attention to Article VII, the contract that was negotiated after these proposals were submitted, and I ask you whether or not the proposal to eliminate rail-flat-car service was not itself eliminated from the contract.

A. What article is that that you are referring to now?

Q. Article VII.

A. Yes, it has been eliminated.

Q. It was eliminated. Then am I correct in stating, Mr. Jenkins, that in 1946, prior to the negotiation of the agreement, the union demanded the elimination of the flat-car service but when it signed the agreement no such proposal was contained in the agreement, is that correct?

A. Correct.

Q. Now, Mr. Jenkins, did you participate in the negotiations of the 1949 agreement?

A. I expect I did.

Q. And the procedure which you described in connection with the 1946 proposal was followed in 1949, is that correct?

A. Yes.

Q. Now, did you in advance of the negotiations meet with members of your wage scale committee and figure out a set of proposals?

A. That is the procedure.

Q. Yes. And then you submitted the proposals to the employers?

A. Yes.

[fol. 134] Q. Now, I show you this document which consists of several pages and I ask you if this was a copy of the 1949 proposal submitted to the employers by the wage scale committee of Local 25?

A. My answer would be yes.

Mr. Burstein: I respectfully offer that in evidence, your Honor.

Mr. D'Arcy: No objection.

(A copy of the 1949 Union Proposal marked Plaintiff's Exhibit No. 5.)

Q. And following the submission of these proposals, a contract was negotiated, wasn't it?

A. Right.

Q. Now, Mr. Jenkins, I show you a document called, "Agreement Between Local 25," dated April 12, 1949, and I ask you if this is the agreement that was negotiated in 1949.

A. Yes.

Mr. Burstein: I respectfully offer that in evidence, your Honor.

The Court: It may be marked.

(Copy of 1949 agreement marked Plaintiff's Exhibit No. 6.)

Mr. Burstein: I should like to call your Honor's attention to the language of Article VII, and I will not burden your Honor by reading it again, except to say that in the proposal there appears the following language:

"Movement by rail flat cars or ships"—something new has been added—"cannot be used while employers have available equipment of their own or employees on the seniority list are not working."

Q. Now, Mr. Jenkins, was that a demand of the union, the elimination of the flat-car service so long as drivers weren't working?

[fol. 135] A. If it is spelled out in the proposed contract, I would say it would be a demand.

Q. Yes, sir. Now, look at Article VII, will you please, of the agreement now marked Plaintiff's Exhibit No. 6, and tell the Court whether or not that condition, the elimination of flat-car service is contained in the collective bargaining agreement.

A. It is not.

Q. And, therefore, that demand was dropped, isn't that so?

A. Obviously.

Q. Now, Mr. Jenkins, based on your knowledge—and I know it's an expert one; you have been in this field a long time—isn't it a fact that the prohibition against the flat-car operation has never been contained in any agreement made by Local 25?

A. That would be my observation.

Q. That would be true, wouldn't it? And if I were to show you the 1951 agreement, the one that is presently in effect, you would agree, would you not, that there is no prohibition against the use of flat cars?

A. Right. Could I say this——

Q. Yes, sure.

A. I assume that the business agents any myself termed the rail operation equipment over which we might or might not have jurisdiction.

Q. Let's get to that point, the language. Are we agreed, at least you and I, that there is nothing in the contract which says, like your proposals say, no movement by flat car, right?

A. Yes.

Q. But there is something in the contract which says something about leasing equipment, isn't there?

A. That's right.

Q. And you say that in your judgment and in the judgment of Messrs. Norton and McCarthy, leased equipment might mean flat cars, right?

A. I didn't say that.

Q. What did you say?

A. I said it could be termed leased equipment.

[fol. 136] Q. Well, let me restate it: then in your judg-

ment, the flat-car operation might be termed leased equipment?

A. That's right.

Q. But that isn't expressly spelled out in the agreement?

A. That's right.

Q. There is a question about that, isn't there?

A. That's right.

Q. A question about interpretation?

A. Right.

Q. Now, isn't it a fact that when there is a question of interpretation of any term or condition of the agreement, you go to the grievance precedure?

A. That's right.

Q. Now, if there is a question and you want to submit it, will you tell his Honor how you resolve questions of interpretation? Do you stop trucks? Answer that first.

A. No, I will answer it this way——

Q. You answer my question.

A. Do I stop trucks?

Q. Do you stop trucks if you dispute the interpretation?

A. My answer would be no.

Q. Do you call a strike?

A. No.

Q. Do you call a picket line?

A. No.

Q. Do you jump on the cars of other truckmen and stop them from going anywhere?

A. Not for that particular purpose.

Q. No you don't do that. When there is a question concerning the interpretation of a contract, what do you do as a responsible union leader?

A. Well, for your information, we do this:

Q. Yes, sir.

A. We have a wage scale committee set up by the employers group and the wage scale committee set up by Local 25 of people who negotiated the contract, and prior to any dispute, we sit down in some particular hotel and try and iron out our differences.

[fol. 137] Q. Right.

A. In which case this was done.

Q. You did sit down. With whom did you sit down to iron out your differences?

A. We sat down with Mr. Thompson of the employers group, with Jack Griffin from Imperial Motor Freight Lines.

Q. Well, I am not going to ask you to search your memory. I will take the two. That's fine. That is the first step, if you have a grievance or you don't agree on the interpretation, the employers' representative and the wage scale committee of the union sit down and try to discuss it and work it out?

A. That's right.

Q. Sometimes that works out fine?

A. Sometimes.

Q. Sometimes it doesn't?

A. Sometimes.

Q. Now, when you fellows can't work it out, what do you do? What is the next step?

A. The next step is to follow procedure.

Q. What is the procedure? Tell the Court.

A. The procedure is the joint committee.

Q. Now, will you tell the Court what that joint committee is set up from?

A. It's 3 business agents and 3 employers, and if we don't come to a happy meeting, the seventh man makes the decision.

Q. Now, tell us, after you met at the hotel with Frank Thompson and Jack Griffin and you couldn't agree on it, did you take the second step?

A. No.

Q. You didn't take the second step?

A. No.

Q. You didn't submit it to arbitration, did you?

A. No.

Q. But Norton and McCarthy went down and stopped the operation at Yard 5?

A. I don't know what they did.

Q. You certainly didn't authorize it?

A. I am in no position to authorize it.

[fol. 138] Q. Now, as president of the union, have you the authority to set up a picket line?

A. No.

Q. As president of the union, do you have authority to call a strike?

A. No.

Q. Now, isn't it a fact that the only way a picket line can be set up or a strike called is to have an executive committee meeting?

A. Yes.

Q. And it has to be authorized by the executive committee meeting?

A. No.

Q. Well, who has to authorize it?

A. It has a procedure.

Q. Tell us the procedure. What is the procedure?

A. From the local union to the Teamsters Joint Council No. 10 in Boston, from the Teamsters Joint Council to the Teamsters International in Indianapolis.

Q. In other words, when Local 25 wants to take some action outside the grievance machinery or outside some intra-union matter, it goes to the executive committee, and then it goes to the Teamsters Joint Council No. 10 and then, for authorization, you have to go to the international?

A. That is for strike sanction.

Q. Now, how about picketing?

A. Well, we wouldn't have pickets unless we had a strike.

Q. All right. Now, how about any other interruption of a service such as occurred at Yard No. 5? How would you handle a situation like that? Tell the Court.

A. Well——

Q. Suppose you had a dispute and somebody was—strike that. Mr. Jenkins, you have been in this field a long time and I know it. There was a time, was there not, when a long-distance carrier came in from New York, dropped the loads off at a terminal, and then a local carrier picked it up and moved the stuff on, is that right.

A. That's right, that's the procedure.

[fol. 139] Q. Now, there are some over-the-road carriers, when they get a full trailer load, will pick up the stuff in New York and deliver it directly to the consignee at a store-door delivery without using an intermediate terminal or using a local carrier, is that right?

A. Providing they have no terminal here.

Q. Now, suppose one of your agents got the bright idea that Local 25 men who normally do local work aren't

getting any work because these over-the-road people are delivering directly to the consignee, and your agent decides that he is going to compel them to drop it off at a terminal and hire a local carrier for delivery. How would he handle it?

A. We just don't get into that. We don't handle it.

Q. Tell me how you got into the New Haven situation.

A. I don't know.

Q. You don't know?

A. No.

Q. You are the president of the union and you don't know how Norton and McCarthy got into this deal?

A. That's right.

Q. You would like to see them out of this deal, wouldn't you?

A. Well——

The Court: Perhaps that isn't a fair question.

Mr. Burstein: I will withdraw it.

Q. But you don't know how they got into this deal. Did they consult you before they got into this deal?

A. We talked.

Q. When did you talk, Mr. Jenkins?

A. We talked—I think it was Sunday.

Q. Sunday?

A. That's right.

Q. That was after the time this thing happened?

A. That's right.

[fol. 140] Q. Now, I am talking about prior to July 11. Did Mr. McCarthy or Mr. Norton come to you and say: Mr. Jenkins, as president of the union or as another brother delegate, we have an idea that the New Haven Railroad or Stone's Express are taking work away and we ought to knock these guys off. Did they say anything like that?

A. Against the New Haven Railroad?

Q. Against the truckmen.

A. No. We said it's possible that we could have a dispute.

Q. It's possible we could have a dispute?

A. That's right.

Q. But the first time you knew that Norton and Mc-

Carthy were going to stop an operation was on Sunday, is that right?

A. No. I was over there to make an observation Friday night, I think it was.

Q. Friday night. Now, prior to that—I think we'll get to some point of agreement—prior to July 11, July 10, 9, 8, 7, 6, did Norton and McCarthy come to you and say to you: Mr. Jenkins, we think we are going to stop trailers from going out on flat cars via the New Haven Railroad.

A. No, other than about the middle of July, we sat down with the employers group and tried to iron out our differences, like I told you before.

Q. And that failed?

A. To see if we could come to an agreement.

Q. And you couldn't——

A. I wouldn't say it failed. I think we had a very nice relationship.

Q. I think you have done well as president of the union. I am not criticizing your abilities. I know they have been well done. In this case, I want to reserve my judgment. Now, coming back to this meeting in July, or whenever it was, after that meeting broke up and there was no concrete result, there were no further steps taken in the grievance procedure?

A. That's right.

Q. The next thing you knew, on July 11, Norton and McCarthy had stopped some of the operation at the New Haven yard?

A. I didn't know whether they had stopped them or not. [fol. 141] I went over there to make an observation myself nd I found out when I got there that there were about a half dozen people ganged up and walking around, talking, walking. I didn't know what the score was myself.

Q. Did you inquire?

A. I said, "What's the matter."

Q. What did you find out?

A. They says, "There's a little dispute between the employers and the union."

Q. Then you found out there was a dispute between Norton and McCarthy and the employers?

A. I would say Local 25 and the employers.

Q. Then for the first time you as president learned there was a dispute was when you came down to the New Haven yard? That was the first time?

A. No, that wasn't the first time. Somebody told me going along Portland Street that there was something the matter at New Haven.

Q. That's July 11, isn't it?

A. It could be. I didn't make notes.

Q. And the first time you as president knew there was a dispute between your union and the employers was when someone told you there was something going on at New Haven?

A. That's right.

Q. Is it customary for business agents to handle disputes without advising the union?

A. Ordinarily, they advise me as to what they do and every time they do it.

Q. And if they can't work it out, you try and work it out for them?

A. We all try and work it out together.

Q. And if that fails, then you go through the grievance machinery?

A. Yes.

Q. And the idea of grievance machinery—and now I call on your knowledge as a labor leader—the idea of grievance machinery is to prevent work stoppages, to see [fol. 142] that everybody and everything keeps moving until you settle the thing?

A. That's right.

Q. And that is your policy personally, that if there is a dispute, you keep working?

A. I am speaking for myself and my associates.

Q. I say, that is a policy that you observed together with your associates, that if there is a dispute, the parties keep working and then you try to settle out like the contract provides, is that right?

A. That's right.

The Court: We'll take a recess now until 2 o'clock.

(Recess at 1 p.m. until 2 p.m.)

Afternoon Session—2:00 p.m.

EDWARD F. JENKINS, *Resumed*

Direct examination, *continued*

By Mr. Burstein:

Q. Mr. Jenkins, prior to the activities which occurred at Yard 5 on July 11, to your knowledge, was there a meeting of the executive committee in the course of which the activities which occurred on July 11 were authorized or approved?

A. At the executive board?

Q. Yes, sir.

A. No, sir.

Q. And prior to the activities on July 11, 12, and 14, was there a meeting of the membership of the union at which these activities at Yard 5, participated in by Norton and McCarthy, was approved or authorized?

A. No, sir.

Q. I believe you testified that you appeared at Yard 5 on July 11 after having learned of some disturbance down at the yard, is that correct?

A. That is correct.

[fol. 143] Q. And at that time, did you have a conversation with anybody at the yard?

A. Nobody in particular.

Q. Did you speak with Norton and McCarthy?

A. Yes, I did.

Q. And what did you say to them and what did they say to you?

A. They said to me, "A a result of our meeting and a misunderstanding between the employers group and us, we have an activity here now that we don't know where we are going." Their primary interest was with the membership and the employment of the membership of Local 25.

Q. Now, so that we understand that, Norton-McCarthy said that as a result of that earlier meeting where the 3 representatives of the union and 3 representatives of the employers had met, which hadn't led to any solution, they were taking this particular action down at the New Haven Yard?

A. They didn't use the words particular action. There was something said that: we had to find out where we were going and what we were going to do in order to see if we couldn't bring about some happy medium whereby our members could be included.

Q. So that in order to settle that question whereby the membership could be included, they were taking certain steps down at Yard 5?

A. I don't know what you mean by Yard 5.

Q. They were doing something at Yard 5?

A. There was a group of the membership there on occasions and the business agents and myself, that's right.

Q. And what did you notice that they were doing there, Mr. Jenkins?

A. I didn't notice anything in particular.

Q. Well, did you notice that there were trailers about the yard that weren't being loaded?

A. In my time, no.

Q. Not while you were there?

A. No, sir.

Q. I take it that you personally didn't instruct any driver of a tractor and trailer either to refuse to enter [fol. 144] the yard or, where there was a trailer in the yard, to refuse to drive the trailer up the ramp?

A. That is right.

Q. You didn't do that. Now, did you hear Norton and McCarthy or either of them give such instructions?

A. No, I did not.

Q. Did they ask you for the authority to give such instructions?

A. No.

Q. So far as you knew, there was no such authority and no such instruction?

A. That's right.

Q. Now, on July 12, did you appear at the New Haven Yard?

A. Would that be Saturday?

Q. Yes.

A. No, sir, I did not.

Q. Did you appear there on July 14?

A. I did.

Q. At about what time, sir?

A. In the vicinity of 5 p.m.

Q. About 5 p.m. And what did you notice at that time?

A. I was talking with some of the people around there, and I had just about got over there when some gentleman came and handed me a restraining order; and as a result of that, we got out of there.

Q. So when you came down at 5 o'clock, you had hardly had a chance to notice anything and then there was a restraining order?

A. That's right.

Q. Now, between July 11 and July 14, did you have a conversation with Norton and McCarthy or either one of them?

A. No, I did not because I don't see them but maybe once or twice a week.

Q. So they didn't consult you about the activity down at Yard 5?

A. No, they did not.

Q. And so far as you know, there was no meeting of the executive board of the union to discuss this matter?

A. That's right.

[fol. 145] Q. And would it be fair to say that McCarthy and Norton were acting exclusively on their own?

A. Yes, it would be fair to say, sure. They are the business representatives of the organization, handling the business for the organization.

Q. Of course, the business representative of the organization doesn't have the authority to call a strike?

A. No, that's right.

Q. Their authority is limited, isn't it?

A. That's right.

Q. Now, for example, if there is an argument or a dispute at a barn with a particular employer, the business representative might take the matter up with the employer and try to work it out?

A. That's right.

Q. And if he fails, then you would use the grievance procedure in the contract. Isn't that the way it works?

A. That's right.

Q. And while they were working through the grievance procedure or while the grievance procedure was set in motion, there would be no work interruptions, either a lock-out or a strike, isn't that correct?

A. Well, in some cases, that would be right. We have violations of the contract that call for immediate action.

Q. Well, if there is a violation of the contract, do you say that the union takes the position it can decide when an employer violates the contract?

A. It has been done.

Q. Isn't it a fact that even in such instances, the grievance and arbitration procedure is used?

A. Well, we have a grievance procedure and an arbitration procedure in the contract but it does not say in that procedure that we can't use discretion at times. In other words, it doesn't say that we cannot strike people.

Q. It doesn't say. Now, is it your understanding that if there was a dispute or a grievance, that the delegate could decide that he wants to take care of it by striking the people?

A. No.

Q. He couldn't do that?

A. That's right, but I do say circumstances alter cases. [fol. 146] Q. That is what I want to get straight. Now, let me see if we understand each other. If there is a dispute or a grievance, normally you use the grievance procedure?

A. Right.

Q. But there are times, you say, that if there is a violation of the agreement, you may call a strike anyhow, isn't that right?

A. On rare occasions, very rare.

Q. But when a strike is called, it would have to be called through the procedure of the executive board of the Teamsters Council 10 and then the international, right?

A. No, not exactly.

Q. How would it be done?

A. As I say, on a rare occasion in a particular case, it has been done throughout the industry that sometimes we couldn't come to any happy medium with an employer,

and as a result of that, we have to take our people from the job.

Q. Yes, I know, but when you do that, you follow the procedure which is set up in your constitution and bylaws?

A. Not necessarily at all times.

Q. In other words, there are times when a strike may be called without getting the executive board to sanction it?

A. We don't use the term strike. We use the term stoppage, until such time as we all come to an agreement and know where we are going.

Q. Is a business agent permitted to call a work stoppage?

A. Emphatically no.

Q. I wanted to get that. And that is a job for the union, is it not, if it decides it has a grievance which it can't settle? Then the union alone is the one, is it not?

A. I said to you already that there are exceptional cases like I tried to cite to you a moment ago, whereby the agent has to make a decision then and there.

Q. And when he makes a decision then and there, does he report back for authority or approval?

A. More or less.

Q. More or less. And in this case, after Norton and McCarthy made the decision, they did not report back to you [fol. 147] because you said you didn't speak to them between July 11, on Friday, and July 14, on Monday?

A. That's right.

Q. All right. Now, do you know whether or not since the date of institution of this service, the union, Local 25, has had a dispute with the railroad about this service? I am only speaking of the railroad.

A. No, I can't recall. I can recall instances whereby the employers had some difficulty among themselves.

Q. But I am speaking of the union and the railroad.

A. When the inception of the flat car came in.

Q. But between the union and the railroad, there has never been any dispute?

A. I can't recall any.

Q. And would it be fair to say that there is no dispute even now between the railroad and the union?

A. That's right.

Q. Now, do you know whether there was any dispute between any of the employees of the union and any of the employees of the railroad?

A. Employees of the union and employees of the railroad?

Q. Right—I mean member of the union. I said employees.

A. My answer would be no.

Q. No dispute. Now, do you know whether or not there has been a dispute between Local 25 and any union representing the railroad workers?

A. That I couldn't say.

Q. You don't know?

A. I don't know.

Q. To the best of your knowledge, however, there has been none?

A. That's right.

Q. All right. Now, have you, as president of the union, or has any other official to your knowledge and with your consent demanded at any time during the life of the present contract that motor carriers who are parties to that con-[fol. 148] tract assign all the work of transporting merchandise in interstate commerce to motor vehicles?

A. I don't quite——

Q. Is that question clear?

A. I don't get the question.

Q. All right. I will withdraw it and restate it. First, have you, as president of the union, at any time demanded of the motor carriers with whom the union has a contract that all the interstate work which the motor carriers have be transported over the highways in motor vehicles?

A. No.

Q. No, sir. You know, as a matter of fact, that a portion of that work has always gone by flat car, isn't that right?

A. A portion?

Q. A portion of the work has always——

A. At the outset, it was supposed to be the overflow that we couldn't handle.

Q. But you know a portion has always gone by flat car?

A. Yes.

Q. And you do not now insist, if I understand you correctly, that all the work be assigned to motor carrier employees?

A: No, we don't insist on it all but we certainly insist on our membership getting a portion of the work. That seems to be what is involved here.

Q. Now, let me get that. Is it your statement that the dispute which you have now with the motor carriers is that the motor carriers' employees, the union membership, get a portion of the work which is now going over the rails?

A. We would like to have some. Let me put it that way.

Q. You would like to have some of it?

A. That's right.

Q. But you don't want to cut the railroads out entirely, do you?

A. Not entirely.

Q. But you want to let them have some and you want to take some?

A. That's right.

[fol. 149] Q. And Norton and McCarthy want to decide how much that shall be?

A. I didn't say that.

Q. Didn't they try?

A. I don't know.

Q. You don't know what they did. That's what I thought. Now, based on your knowledge of what occurred at Yard No. 5 on July 11, July 12, and 14—and I bear in mind, Mr. Jenkins, that you weren't there all the time and you came in later—based on your knowledge of what occurred there, is it your understanding that the objective of the activities of Norton and McCarthy, whatever they might be, was to terminate the trailer-on-flat-car service?

A. No.

Q. What was the intention? What do you understand it was?

A. Of my own knowledge, as a result of a meeting that we had with the employers group, we tried to sit down and iron it out, as we were being deprived, we thought—and we still think so—of our membership being employed as a result of the rail operation. We tried to come to a

happy medium whereby we could put some of our people to work.

Q. Now, let's see if I understand what you said, and correct me if I am wrong. You say that this interruption which occurred at Yard 5 resulted from the failure of a group of employers and a group of union representatives to work out a plan under which a certain portion of the work that is going between Boston and New York would go via the highway and motor trucks and a certain portion would continue to go on the flat cars, is that the idea?

A. Yes.

Q. And you wanted to work out some division with the motor carriers?

A. Yes.

Q. And you wanted to make some agreement with them on that basis?

A. No. We wanted to stand on our jurisdiction under Article I of the contract.

Q. But you wanted to come to some understanding?

A. That's right.

[fol. 150] Q. And you wanted in a sense to say: well, this portion goes to the motor carriers and that portion will go to the rails. Is that the idea?

A. In a general way, yes.

Q. And then that meeting didn't result in such an understanding, and you didn't call a further meeting? No further meeting was called with the employers, right?

A. That's right.

Q. All right. So the next thing that happens is that Norton and McCarthy go down to the yard and they stop trailers from coming into the yard in order to work out this program, right?

A. It's been alleged.

Q. Yes, sir, right. Is that correct?

A. It's been alleged that they stopped trailers.

Q. Now, Mr. Jenkins, you have been with this union a long time. Now, since, Mr. Jenkins, since 1938, has the membership of Local 25 increased?

A. Oh, very much so.

Q. Very much so. And when I use the date 1938, you do

remember that that is about the time when the trailer-on-flat-car service was instituted, isn't that so?

A. In and around that time, yes, sir.

Q. Now, isn't it a fact—and now search your own memory and recollection of the statistics in this field—isn't it a fact that the number of motor carrier employees engaged in driving vehicles has increased over the years? There are more drivers today than you had in '38?

A. Do you mean the New York operation?

Q. Yes, Boston to New York.

A. Oh, I would say yes.

Q. That is true. And that is true despite the fact that during this period from 1938 to the present, the trailer-on-flat-car service has been growing, too?

A. Very much so.

Q. So both have been growing, the trailer-on-flat-car service and the number of drivers who are operating units, isn't that so?

A. That's right.

[fol. 151] Q. Now, for example, I am sure you are familiar with a trucking firm known as M & M Transportation Company in Boston?

A. Yes.

Q. You know that company?

A. Yes.

Q. Now, do you think, searching your own recollection, that the following would be fairly representative of the experience of motor carriers in this area: M & M in 1938 used about 30-odd drivers for over the road. Do you know how many drivers M & M uses over the road today?

A. No, I don't.

Q. Approximately?

A. No.

Q. Well, would it help you come to some conclusion if I told you it was over 70?

A. I wouldn't doubt that.

Q. You wouldn't doubt that. Now, you know for a fact, do you not, that the number of trailers which move by flat car that originate with M & M has increased between 1938 and today? Isn't that true, Mr. Jenkins?

A. I would say yes.

Q. So that at the time the number of flat cars increased, the number of vehicles that went over the road also increased, and new employment opportunities were created for drivers, isn't that true?

A. That's right.

Q. All right. Now, I want to ask you a few more questions and I won't disturb you any longer.

You have been in this industry for a long time, and I know it. And isn't it a fact that there was a time when motor truckmen confined their operations exclusively to little local areas? Isn't that true?

A. That's right.

Q. If you go back to the history of the industry.

A. That's right.

Q. And then the operation expanded as the different types of units were introduced; and then you got a fellow who went from Boston to Hartford, and that was a long haul, wasn't it?

A. That's right.

[fol. 152] Q. And then he went as far as New Haven and that was a little longer haul?

A. Right.

Q. And then he went from Boston to New York, and that was a little longer haul?

A. Right.

Q. And when he began to move in interstate commerce, he got freight, isn't that true, and he got it because there was a demand for it, isn't that so?

A. Yes.

Q. Where did he get the freight from? Who handled the freight before the truckman handled it?

A. Who handled it?

Q. Yes.

A. I am very familiar with who handled it. The railroads handled it.

Q. The railroads handled it. So a portion of the freight which is now transported by the motor carriers used to be transported by the railroads, isn't that so?

A. That's right.

Q. Now, do you know, based on your very long experience in this field, of a single instance where a railroad

union or its members picketed a motor carrier terminal to make sure that the freight which the motor carriers are now handling will be returned to the railroads? Do you know of any such instance?

A. No.

Q. You never heard of it, did you?

A. No.

Q. Now, is it your position that the railroads are now handling some of the freight which the motor carriers would be operating over the highways if it weren't for flat-car service?

A. Yes.

Q. It is?

A. Yes.

Q. Wasn't that the freight the railroads originally had?

A. Yes.

Q. Now, you don't know of a single instance where a railroad or its employees picketed a motor carrier?

A. No.

[fol. 153] Q. Now, let me ask you one more thing. You are familiar with New England Transportation, aren't you?

A. You mean the company?

Q. Yes, New England Transportation.

A. Yes.

Q. And you heard Mr. D'Arcy inquire about the relationship between New England Transportation and New Haven?

A. That's right.

Q. And you know they are a subsidiary, don't you?

A. I heard it in the court room this morning.

Q. But so far as you know, New England Transportation is a separate company that is in the trucking business, right?

A. Right.

Q. And you have a contract with the New England Transportation?

A. That's right.

Q. And you know, do you not, that New England Transportation—that the primary work of its men is to drive the trailers which are brought in by other motor carriers onto the ramps and onto the flat cars, right?

A. Right.

Q. And year after year, you made contracts with the New England Transportation?

A. Yes.

Q. And you knew all the time that they were handling the trailer-on-flat-car work?

A. Yes.

Q. Did you ever tell New England: we won't make a contract with you because you are handling trailer-on-flat-car work?

A. No.

Q. Nobody ever said that, isn't that right?

A. That's right.

Q. And year after year, contracts were made, and year after year, adjustments were made, disputes were settled, and so forth, right?

A. Right.

[fol. 154] Q. Okay. Now, let me ask you this: is it a fact that sometime in 1951 you had a little dispute with New England Transportation, is that right? Do you remember that, Mr. Jenkins?

A. No, I do not.

Q. Well, maybe I can refresh your recollection. Maybe it was 1950. Do you remember a dispute sometime between 1950 and 1951?

A. Very vaguely, yes.

Q. Now, see if I can refresh your recollection. In 1950 or 1951, the New England Transportation, in the course of performing this trailer-on-flat-car service, had to have the trailer wheels, the dolly wheels wound up, the dolly wheels. That work was being done by a railroad employee. Does that refresh your recollection?

A. Yes, sir.

Q. Do you recall that the union went to the New England Transportation and said: Look, fellows, we want you to put a Local 25 man on to do the winding of the dolly wheels. Do you remember that?

A. Yes.

Q. And the New England Transportation did it, didn't they?

A. Yes.

Q. Okay. And that's how you settled that dispute?

A. Yes.

Q. You didn't tell New England drivers to stop handling these trailers and riding them up the ramps?

A. I don't think so.

Q. That's right. And then when they got themselves a pollard wheel, that man wasn't required any more, right? Do you recall that? New England got a pollard wheel?

A. I don't just——

Q. You don't recall that, a hydraulic lift which didn't require the use of the dolly wheels?

A. I have seen them.

Q. So now it is being handled by an automatic device?

A. It could be, yes.

Q. Now, Mr. Jenkins, I have a great deal of regard for your background in labor relations, and I want to ask you a question as an expert. You have been in this field for a [fol. 155] long, long time. Let me pose this question to you and I want your answer: do you know that in one of the department stores, Jordan Marsh, there are sales girls who get commissions when they sell, p.m.'s when they sell, isn't that so?

A. I understand that is the way they operate.

Q. A salary plus commission. Now, the more sales they make, the more commissions they will have, isn't that so?

A. I expect so.

Q. Now, as an expert in New England labor relations, would you say that the retail sales clerks representing the Jordan Marsh sales girls ought to throw a picket line in front of Filene's to prevent customers from going into Filene's?

Mr. D'Arcy: Objection, your Honor. I can't see where this line of questioning——

The Court: Neither can I but he can put it on the record.

Mr. D'Arcy: —is at all——

Mr. Burstein: It's a parallel situation.

The Court: Just ask him.

Q. In your judgment, would that be proper labor activity for the Retail Sales Clerks representing employees of Jordan Marsh to throw a picket line around Filene's to prevent customers from going into Filene's?

A. I could answer you this way: the circumstances would alter the case.

Q. You think there are some circumstances under which they can picket?

A. I do.

Q. Tell me under what circumstances.

The Court: I wouldn't bother with that.

Mr. Burstein: All right. I will withdraw that.

[fol. 156] Q. Mr. Jenkins, you appeared here in response to a subpoena which you received. You are not here as our voluntary witness, I take it?

A. That's right.

Mr. Burstein: You may inquire. I have no further questions of the witness.

Cross-examination

By Mr. D'Arcy:

Q. Mr. Jenkins, in connection with the operation of Local 25 of the Teamster's Union, is not the area under the jurisdiction of the union divided into different segments which are covered by particular business representatives?

A. That's right.

Q. And in the vicinity of Yard 5 belonging to the New York, New Haven and Hartford Railroad, to whom is that area assigned?

A. Assigned to agents Norton and McCarthy.

Q. And as part of agents Norton and McCarthy's duties, it is their function, their duty to take up any grievances, any complaints which arise in that particular area, is that correct?

A. That's right.

Q. Do you have any jurisdiction in that particular area except in a consultatory manner with Mr. Norton and Mr. McCarthy?

A. No, sir.

Q. Do any other business agents of the union have any authority there except in consultation?

A. No, sir.

Q. Do you have contracts, Mr. Jenkins, with various motor carriers in and around the City of Boston?

A. Yes, sir.

Q. Have you been here and heard the testimony of prior witnesses as to particular trailers belonging to particular employers being stopped?

A. I have.

Q. Do you recall from having heard the testimony that the only vehicles which have been identified by the witnesses belong to Harrison, D&N, Rand, Sears, and Stone's?

A. Right.

[fol. 157] Q. Do you have contracts with each and every one of those employers?

A. Yes, sir.

Q. Do you of your own knowledge, from having been down at Yard 5 on any of the 3 days in question, know of any activity having been directed towards anyone other than those employers to whom it has been testified——

A. No, I don't.

Q. As a matter of fact, do you know of your own knowledge, from having observed the activity; that activities were expressly kept from being directed at anyone other than employers with whom you have contracts?

A. That is right.

Q. That is your understanding?

A. That is right.

Q. Now, when you talk about a dispute—and you have testified earlier that you were not aware of any up until the time that this activity commenced at Yard 5—when you speak of a dispute in that particular reference, do you mean a dispute in the way of stoppage or do you mean a dispute in the way of any disagreement?

A. I would say in a way of any disagreement.

Q. Then you were aware that there was some disagreement prior to the particular 3 days in question?

A. I tried to say in my own way that as a result of the meeting that we had with the employers group on July 2——

Q. Did you have a meeting around July 2 concerning the problem of the rail-carriage of trailers?

A. We did.

Q. Who was present at that meeting, do you recall?

A. Mr. Thompson.

Q. Mr. Thompson as counsel for the employers group of motor freight carriers?

A. That's right, and Jack Griffin was there, and I can't recall—I forget the names.

Q. There were more?

A. Yes.

[fol. 158] Q. All of whom were employers of motor carriers, so-called?

A. That's right.

Q. And do you recall what the result was of the conversations that took place at that meeting?

A. I recall some instances whereby we said that the rail was getting so large that our membership was being disturbed and we would like to sit down and talk about getting some more runs between Boston and New York.

Q. As a matter of fact, have you had complaints from any members concerning the lack of employment brought about as a result of the rail operation?

Mr. Burstein: I object your Honor, hearsay.

The Court: Oh, well, I'll let that go in. Go ahead.

Q. Answer the question.

A. Yes, many complaints.

Q. You have had many complaints from members that there has been a rising unemployment?

A. Yes, sir.

Q. Do you have any unemployed members of Local 25?

A. Yes, a lot of members loafing right now.

Q. Could you estimate approximately how many are unemployed right now?

A. Yes. I would say we have better than 300 people unemployed.

Q. Better than 300 unemployed?

A. That's right.

Q. Mr. Jenkins, in connection with what the union would like to accomplish in this dispute, is it not true that the union would like to secure all of the work of driving these trailers?

A. We would like to secure all of the work.

Q. But even though you would like to secure all of the work, you expect that possibly some settlement can be arranged if you are ever allowed to bargain with your em-
[fol. 159] ployers about it?

A. That was the intended——

Mr. Burstein: Pardon me. That isn't a proper question.

The Court: I know it isn't but we're letting everything in. I suppose that's obvious.

The Witness: To my thinking, that was the intent of the meeting we had with the employers group.

Q. Do you know of anything in the laws of the United States or the laws of Massachusetts which prohibits the organization from striking against these particular motor carriers?

Mr. Burstein: This witness can't testify to conclusions of law.

The Court: I think that's going a little far. You can tell me what the law is.

Mr. D'Arcy: I beg your pardon.

The Court: You can tell me what the law is.

Q. Is there anything in this contract which prohibits the union or its members from withdrawing their services?

Mr. Burstein: Your Honor, there is no contract in evidence to begin with, and I think it ought to be put in evidence if he wants to examine with it. Moreover, once it is in evidence, it speaks for itself.

The Court: He's referring to one of your exhibits.

Mr. Burstein: No, your Honor, I haven't submitted any. I am perfectly willing that either my brother or I do it so the Court will have the advantage of a contract before him. There is no contract before your Honor except the preceding agreements.

[fol. 160] Mr. D'Arcy: May we enter into a stipulation, your Honor, that this agreement which plaintiff has a copy of represents a copy of the agreements which Local 25 has with all the carriers——

Mr. Burstein: Say most of the carriers.

Mr. D'Arcy: —with all of the ones whose trailers have been stopped in accordance with the testimony?

Mr. Burstein: Oh, yes, that's perfectly all right. And I think we ought to mark it, if you will, as Plaintiff's Exhibit No. 7.

Mr. D'Arcy: And we agree that the copy is a copy of what would be the original.

Mr. Burstein: We are in complete agreement only on that point.

(A copy of presently existing contract between defendant union and motor carriers marked Plaintiff's Exhibit No. 7.)

Q. Can you see the agreement there, Mr. Jenkins?

A. Yes.

Q. Do you of your own knowledge know that to be the agreement which is in effect as has been stipulated?

A. That is the agreement.

Mr. Burstein: We have already agreed on it.

Q. Is there anything in that agreement, Mr. Jenkins, which prohibits the union from striking?

Mr. Burstein: Well, I am going to object to that. That agreement speaks for itself. It's in evidence.

The Court: I know, but let him answer what he thinks.

Mr. Burstein: All right, your Honor.

The Court: Go ahead.

[fol. 161] The Witness: By that do you mean a no-strike clause

Q. That's right.

A. No, there is none.

Q. There is none, is that the answer?

A. That's right.

Q. In your opinion, Mr. Jenkins, having been one of the men who helped to negotiate this particular agreement, is there anything in it which requires the union to resort to a grievance procedure or arbitration before any other means of settling a dispute is taken?

A. No.

Q. There is nothing which so requires it?

A. No.

Q. Mr. Jenkins, is the union in any way interested in how much business the railroad does?

A. Emphatically no.

Q. Are you interested only in how much employment may be available for your members or employees in the industry?

A. That is my primary interest, my membership.

Mr. D'Arcy: No further questions.

Redirect examination.

By Mr. Burstein:

Q. Well, Mr. Jenkins, isn't it a fact that if the railroad does a great deal of trailer-on-flat-car business, it may increase what you call an unemployment problem?

A. It could be.

Q. It could be. Then you are interested in the kind of business the railroad does?

A. I am interested in any business my membership goes to work at.

Q. And that might be the business which is handled by the railroad, too?

A. I don't know about that.

Q. Well, you don't care how much business the railroad handles by trailers on flat cars?

A. I certainly do.

Q. You do. Then you are interested in a little bit of the [fol. 162] railroad's business. Now, you said that you have about 300 unemployed members. Are they all over-the-road drivers, the 300?

A. No, but I would say 75 per cent of them are qualified.

Q. Well, how many of the 300 are men who normally go over the road?

A. How many of them are?

Q. Yes, real over-the-road drivers.

A. I could take the 300 and split it right in half, about 150.

Q. About 150 who are road drivers?

A. Yes, sir.

Q. Now, it is true, is it not, that throughout the history of the industry the practice of employment has been called a shape-up system, hasn't it? There is always a certain

number of men who are unemployed in the industry, isn't that true?

A. Yes, that's right.

Q. There is always some unemployment?

A. That's right.

Q. What is your total membership in Local 25?

A. In the vicinity of 9000.

Q. Nine thousand?

A. That's right.

Q. Now, out of the 9000, you have 150 people unemployed and that is about 1 per cent of the total, is that right?

A. Pretty close to it.

Q. Pretty close to that. Now, do you remember that in 1940 there was a lot of unemployment, wasn't there? Would I be correct in stating that about 20 per cent of the then membership of the union was unemployed in 1940?

A. That would be hard for me to answer.

Q. Your best recollection.

A. I don't recall.

Q. Well, substantially more than there are today?

A. That's possible.

[fol. 163] Q. And the volume of trailer-on-flat-car service is greater today than it was in 1940?

A. Well, not too much.

Q. Not too much?

A. Not too much.

Q. Now, of the 150 of the 9000 who are unemployed, are those persons who were formerly employed by the people who are now using the trailer-on-flat-car service, or are they persons employed by some of the other carriers who never used trailers on flat cars?

A. It is possible that at sometime or other, they have worked with the people using the flat-car operation.

Q. Would it be fair to split the 150 down the center and say 75 may have been working for companies which use the trailer-on-flat-car service and 75 for other people?

A. That's right.

Q. Then out of the 9000 members, you have 75 people out of work because of, you say, the flat-car service.

A. I didn't say that.

Q. I see. Well, I thought you did and I am glad you corrected that. Now, I think you told Mr. D'Arcy that you

only stopped people with whom you had contracts, motor carriers?

Mr. D'Arcy: I object, your Honor. There is no testimony he stopped anybody.

Q. That Norton and McCarthy—put it that way—stopped only motor carriers with whom the union had contracts, right?

A. I would say that's right.

Q. Do you know, as a matter of fact, that Sears Roebuck was stopped? Do you know for a fact they were stopped?

A. I don't know.

Q. Do you have a contract with Sears? Does your union have a contract with Sears?

A. We do in the warehouses, yes.

Q. But how about this part of it?

A. I think an outfit by the name of Boston Delivery does their work.

[fol. 164] Q. That's a local carrier, isn't it? Boston Delivery is a local carrier, isn't it?

A. It is, yes.

Q. It is a local carrier, not a road carrier. But Sears trailers didn't go out. Do you know that is a fact, that the Sears trailers didn't go out?

A. I don't know.

Q. You don't know that. How about Costello Distributing Company. Isn't it a fact that you have a contract with Costello?

A. That's right.

Q. That's right. Now, isn't it a fact that Costello's trailers went out? How about that.

A. I heard it mentioned in the court room this morning.

Q. Yes. So it is not so that the only trailers that didn't go out were those belonging to motor carriers with whom Local 25 has a contract?

A. Would you say that again, please?

Q. Well then, your statement which you made before that the only people affected were those who had contracts with Local 25 was incorrect, at least so far as Costello was concerned. At least the Costello trailers went out, isn't that right?

A. To my knowledge.

Q. To your knowledge, sir.

A. That's right.

Q. All right. Now, you talked about this contract, and you were asked whether or not there was anything in this contract which said you must submit it to arbitration.

Mr. Burstein: Well, your Honor, it's rather late, and I merely call to your Honor's attention the provisions of Article VIII of this agreement now marked Plaintiff's Exhibit No. 7 in evidence, which sets forth very specifically that in the event of a grievance, not only as to the interpretation and application and construction of the terms, but even further, any alleged violation of this agreement, the matter should be submitted to arbitration and the grievance procedure. This entire contract is instinct with the obligation to maintain working conditions.

[fol. 165] I don't want to burden your Honor with a reading from the contract. I know your Honor will look at it.

I have no further questions.

Thank you, Mr. Jenkins.

Recross-examination.

By Mr. D'Arcy:

Q. Mr. Jenkins, there seems to have become some dispute about whether or not Sears or Costello was stopped. I think the question that was put to you was: do you know that a Sears truck or a Costello truck was not shipped on the particular days in question?

A. No.

Q. You don't know?

A. No.

Q. Do you have any knowledge of such a truck having been stopped by any of the agents of the union?

A. No, I don't.

Q. I think you have admitted that you have a contract with the Boston Deliveries?

A. Yes.

Q. Which Boston Deliveries Company hauls for Sears Roebuck, is that correct?

A. Yes, sir.

Mr. D'Arcy: No further question.

(Witness excused.)

Mr. Burstein: Your Honor, at this time the plaintiff rests. I should like to say that we have a number of other witnesses but they would be merely corroborative of the testimony already adduced and I will not further burden the Court. Plaintiff rests at this point.

Mr. D'Arcy: I should like to call Mr. Hugh Murphy.

[fol. 166] Hugh F. Murphy, sworn.

Direct examination.

By Mr. D'Arcy:

Q. Mr. Murphy, would you state your full name and address, please?

A. Hugh F. Murphy, 488A Main Street, Charlestown, Massachusetts.

Q. You were in the court room, were you not, on the first day, yesterday, of this proceeding and were sworn as a witness?

A. Yes, sir.

Q. You are in the court room, are you not, Mr. Murphy, in response to a subpoena served upon you by representatives of the plaintiff?

A. Yes, sir.

Q. Have you been here and heard the testimony offered in the last 2 days, Mr. Murphy?

A. Yes, sir.

Q. During any of the days in question, did you drive a trailer-truck down to Yard 5?

A. No, sir.

Q. Were you in any way interfered with from driving a truck to Yard 5?

A. No, sir.

Q. Were you assigned by your employer to drive a trailer-truck to Yard 5?

A. I was at the time, but my time was up and I was discharged to go home and I did not deliver the trailer.

Q. For whom do you work?

A. Benjamin Motor Express.

Q. Benjamin Motor. And none of the union representatives or nobody speaking on behalf of the union told you not to deliver any trailer?

A. No, sir.

Mr. Burstein: Well, your Honor, if this man wasn't dispatched to Yard 5, we will agree he hasn't been stopped. It's self-evident. There is no point in burdening the record that a man wasn't at a given place when he wasn't directed to go there.

[fol. 167] The Court: Well, I am going to let him put in his evidence.

Mr. D'Arcy: I have no further questions.

Mr. Burstein: We have no questions.

(Witness excused.)

Mr. D'Arcy: I would like to call Mr. William McCarthy at this time.

William J. McCarthy, sworn.

Direct examination.

By Mr. D'Arcy:

Q. Would you state your name and address?

A. William J. McCarthy, 75 Dorthy Road, Arlington, Massachusetts.

Q. Would you state your occupation?

A. Business agent, Truck Drivers Union, Local 25.

Q. Are you one of the defendants named in this suit?

A. Yes.

Q. You have heard the testimony, Mr. McCarthy, to the effect that you and Mr. Norton took this entire activity upon yourselves?

A. I have, yes.

Q. Did you do anything in connection with this activity as a result of talks that you had with employers with whom you have contracts?

A. Yes.

Mr. Burstein: Your Honor, I am going to object unless this witness is permitted to testify himself. This is obviously leading.

The Court: Well, that doesn't bother me any. Let's get along here. Let him ask questions he wants to.

Q. You have had meetings with some of the employers concerning this particular problem, is that so?

A. Yes.

[fol. 168] Q. When did you last have a meeting?

A. Our last meeting with the employers was a week ago. I will have to look at my calendar for the date. It was Saturday—or Monday, rather, the 14th.

Q. And can you tell us what happened and who was present at that meeting?

A. We had a meeting with Mr. Marx, who is the owner or one of the owners of the M & M Transportation Company, at his office at 8 o'clock Monday, the 14th. Mr. Norton and I were present on the union side and Mr. Thompson was there for the employers group, Mr. Marx, and then later on Mr. Sullivan and Mr. Harrington came in.

Q. Did you make any attempt to bargain with Mr. Marx concerning the facts here in dispute, concerning the rail shipment of trailers?

A. Yes, I did then and I did prior to the dispute.

Q. Can you tell us what was Mr. Marx' response?

A. Well, Mr. Marx took a stand that at the time nothing could be done as far as the rails were concerned. We went in there with the intention of seeing if we could get some of the trailers that were running over the rails. For example, Friday night—the M & M Transportation sends out regularly, roughly, around 30 trailers a night, and on Friday, the 13th, they sent out only one trailer and they held 29 men and intended to send out, roughly, around 15 on the flat cars. We went up, of course, to talk that over with Mr. Marx, and he took a definite stand all the way through that nothing could be done at the time. We went, of course, at the request of our members.

Q. Have you had complaints from your members?

A. Oh, yes.

Q. Concerning this problem?

A. Yes, I had complaints from our members many times. We get them every day, especially on this. Where road drivers are held over or held in, the minute they are held in they call us up. As a matter of fact, they go to the flat cars

themselves and look the situation over and come back and tell us about it:

Q. You have heard the testimony as to the activities in which yourself and Mr. Norton engaged in the 3 days in question?

A. I did.

[fol. 169] Q. Can you state at whom any of your activities were directed?

A. At whom they were directed?

Q. That's right.

A. Well, M & M, Stone's, Benjamin's, and probably several others.

Q. Do you have contracts with everybody at whom you have directed your activity?

A. Yes.

Q. Would the union like to secure all of the driving job opportunities afforded by shipment of trailers to New York?

Mr. Burstein: Your Honor, just for the record, I want to object because the line of inquiry is entirely improper.

The Court: I don't see how that has any bearing. Didn't you ask some questions of the president, Mr. Jenkins, about what proportion they wanted? I didn't see the bearing there either. If you want to get it on the record, go ahead. Put everything on. I don't see what bearing it has, as I said before, but go ahead.

Q. Do you now know the question, Mr. McCarthy?

The Court: They probably want all the business they can get. I'll make that finding.

Q. Do you have any dispute with the railroad, Mr. McCarthy?

A. None whatsoever.

Q. Have you ever made any claims upon the railroad, seeking to have the railroad do anything?

A. No, I have never done that.

Q. Have you while being at Yard 5 during the 3 days in question permitted any trailers to enter upon the premises without so much as hailing a driver?

A. Oh, yes.

Q. Can you recall any specific trailers?

A. Well, we had Coakley, Moulton & Holmes, R. S. Bryan, [fol. 170] Adolph's, which they are referred to as Costello—it isn't Costello, it's Adolph—and Pepsi Cola and a lot of other trucks that are hauling the fruit in and out of the freight trains there.

Q. So that you did not stop anybody with whom you do not have a contract providing for hire and tenure of employment?

A. That's right.

Q. Why did you not attempt to stop or interfere with those particular trailers?

A. That we let go through?

Q. Yes.

A. Well, we had no contracts with some of them. The others didn't have a rail operation. We had no dispute with them.

Q. Do you have a contract with the New England Transportation Company?

A. That's right.

Q. The employees covered by that contract are members of Local 25, is that correct?

A. They are, all of them, practically all of them, yes, or they will become members.

Q. The employees of the New England Transportation Company who handle these trailers going off and on the flat cars are members of Local 25?

A. Yes—well, there are times, such as a new man coming in there, and he's a non-union man for a period of time.

Q. That is in accordance with the terms of the agreement?

A. Yes.

Q. During these days, as continuously before as afterwards, many trailers have been shipped in to Boston from outside points, is that not correct?

A. You mean by the rails?

Q. Yes, from outside coming in to Boston from New York.

A. Oh, yes, sure.

Q. Would you have any idea as to how many of those were coming in?

A. By rail?

[fol. 171] Q. Yes.

A. Well, I had a number of them on the 14th, 51 of them.

Q. Fifty-one came in?

A. That's right.

Q. Did you make any effort to interfere with any of those trailers?

A. No, but a request was made on one.

Q. A request was made?

A. Yes, on one, yes, by the men, one of the men. It was in regard to an overload. It had about 25 tons on it.

Q. Overload?

A. Yes.

Q. So that even as to the overload, you weren't particularly disturbed at that time?

A. No, not at the time, no.

Q. Did any of those trailers belong to people with whom you have contracts?

A. Yes, practically all of them did.

Q. Practically all of them?

A. That's right.

Q. So it is fair to say that your only dispute is with the employers with whom you have contracts concerning the trailers which are being shipped out on the rails and thereby depriving your members of employment?

A. That's right.

Q. Now, Mr. McCarthy, as to any of the so-called interference or stoppage of any of these vehicles during the days in question, would you tell us the nature of your activities on those days?

A. The nature of my activities on those days?

Q. Yes, at Yard 5.

A. Well, on Friday, of course, I had several calls from our membership and, of course, in most cases they were from the M & M, that they were not going out Friday night and that they intended to load on the rails Friday or Saturday and hold them in. We went down to the rails, Norton and I, around 4:30 or 5 o'clock, sometime around there, and on those trailers that we had disputes with, as soon as we told them that we were having the dispute with those that are carrying or shipping by rail, they automatically [fol. 172] stated, and everyone stated practically the same thing: it's about time we have done something. And we, of course, talked to them and told them about our dispute,

and they took the trucks back. In most cases, they took them back even before we made the request.

Q. Did you do any picketing?

A. No, no picketing.

Q. Did you wear any arm bands?

A. No.

Q. Did you carry any placards?

A. No.

Q. Did you do anything other than speak to the drivers of the particular motor carriers involved?

A. No.

Q. To your knowledge, Mr. McCarthy, did you ever put your body or did you ever step on the railroad's property during the 3 days in question?

A. Only in the case where Mr. Sundel or Mr. Martin or the other gentleman there have called us for either a telephone or talked to us. That's the only time we did.

Mr. D'Arcy: I have no further questions.

Cross-examination.

By Mr. Burstein:

Q. I think you testified that on July 14, you had a conversation with Myer Marx of M & M?

A. That's right.

Q. Did you have a conversation with him prior to July 11, 1952, before the work interruption occurred?

A. I requested it.

Q. Did you request a meeting with him?

A. Yes.

Q. Did you have a meeting with him?

A. Not with him but with others.

Q. But after the work interruption on July 14, you sat down with Myer Marx and tried to settle the matter with him, is that right?

A. That's right.

[fol. 173] Q. You wanted him to agree that only a certain number of trailers would go over the flat cars and a certain number over the road?

A. We wanted to see if we could come to some agreement.

Q. Did you think that the employers were violating their agreement by handling the flat cars?

A. In this case, I do, yes.

Q. You do. And as business agent, when you think there is a violation of the agreement, you can engage in the activity which you engaged in on July 11? Is that your power as a business agent?

A. In this case, yes.

Q. It is?

A. Yes.

Q. Are you familiar with your contract?

A. Yes.

Q. Do you bother reading it?

A. I do.

Q. Let me read a part of it to you: "Should any difference arise between any employer and any of its employees covered by this agreement with respect to any alleged violation of the agreement, or (b) any grievance on the part of any employer or employee which is not covered by this contract and which the business agent fails to adjust . . ."—and do you know what happens after that?

A. I do.

Q. What happens after that?

A. Just what the contract says.

Q. You tell us. What is the next step if you can't adjust it? You read the contract.

A. Take it to the joint committee.

Q. Did you take this dispute to the joint committee?

A. We did.

Q. When did you take it to the joint committee?

A. About 5 weeks prior to that.

Q. How did you take it to the joint committee? Who initiated it?

A. We had a case of St. Johnsbury Transportation Company.

[fol. 174] Q. Was that the issue?

A. It was.

Q. And what was the arbitor's award?

A. That the men would be paid for the time that they lost, that they put the trailers on the flat cars.

Q. Is it your statement under oath that the issue before the arbitor was the use of the flat cars and the operation of trailers on flat cars?

A. That was.

Q. By New Haven?

A. With St. Johnsbury Trucking Company, that's right.

Q. Tell us what was the issue submitted to the arbitrator.

A. The issue was that St. Johnsbury Trucking Company sent out 2 pieces of equipment, 2 trailers on the flat cars and held in 2 men that were available and kept in 2 pieces of equipment that were available that could have done that work.

Q. And what did the arbitrator award with respect to the men who didn't show up to work?

A. He awarded them—I think he gave one man the trip's pay and other a day.

Q. And how many men were discharged?

A. How many men were discharged? None.

Q. None?

A. None.

Q. And the arbitrator said that from that point on St. Johnsbury couldn't use the trailer-flat-car operation?

A. No, he didn't make any decision on that.

Q. No decision on that?

A. That's right.

Q. Is that right?

A. That's right.

Q. That's what we want to clear up. Now, you said you went to the joint committee on this matter?

A. That's right.

[fol. 175] Q. Didn't you have a meeting with several employers several months back, as Mr. Jenkins testified, and attempted to straighten this matter out?

A. Not that far back.

Q. You don't recall?

A. Oh, yes, I recall very well.

Q. When did you have a meeting with the employer representative?

A. We had a meeting with the employers on the 25th of June, I believe it was. It was a Wednesday. We met at the Hotel Somerset, and we requested the meeting, incidentally. The request for the meeting was the decision of the seventh man on this St. Johnsbury case, where he already made his decision that they pay these men for shipping out on the rails where they should have gone out.

Q. I am not talking about that. Mr. Jenkins said that the question of the use of the flat cars had been a subject matter of some grievance procedure and discussions before. Now, he made no reference to the St. Johnsbury matter. I am asking you about any grievance respecting the use of the flat cars and the trailer-on-flat-car service. Was there a meeting?

A. There was a meeting and that was the purpose of the meeting, through this decision. That was the reason for us to call the meeting, and we had this meeting at 3 o'clock at the Somerset. Present at the meeting was myself, Mr. Norton, Mr. Jenkins, Mr. Sullivan, Mr. Harrington on the union side, and on the other side was Mr. Thompson from the employers group, Mrs. McCaffrey from the employers group, Mr. Griffin from the Imperial Trucking Company, Mr. Krinsky from the Highway Transportation Company, and Mr. Welch from H. P. Welch Company.

Q. Now, was the subject matter of that meeting the use of the flat car for the trailer movement provided by the New Haven Railroad?

A. That was the subject matter.

Q. Now, did you resolve anything, settle anything at that meeting?

A. At that meeting, they didn't seem interested.

Q. All right. So there was no settlement of the problem?

A. There was a settlement.

[fol. 176] Q. What was the settlement?

A. The settlement was made by the seventh man.

Q. What did he settle?

A. He made his decision that if the company ships by rail and holds men in or available equipment, that they pay, they will pay the men.

Q. Have you got a copy of that award here?

A. I don't believe so. It's in our office.

Q. Does anybody have a copy of the award here?

A. I am not sure.

Q. Now, was that limited to the St. Johnsbury Trucking Company?

A. Well, any case that we have a precedent.

Q. Is it your judgment, your statement that St. Johnsbury, the St. Johnsbury decision was a precedent for all other carriers?

A. Well, it has been. It's been in Benjamin's.

Q. Is that your statement?

A. It's an opinion of the union.

Q. And, therefore, if the M & M Transportation Company didn't follow the St. Johnsbury decision, then you could go down to the New Haven Railroad and stop M & M's trucks from coming in, is that your position?

A. We felt that was our best position at that time.

Q. And you felt that you had a right to do it?

A. We definitely did.

Q. So when you testified that you permitted certain trailers to enter Yard 5, you meant that you did not permit other trailers to enter Yard 5, is that correct?

A. Some trailers we wouldn't permit to come in, that's right.

Q. And when you said you did not interfere with or interrupt certain of the trailers, you meant by that that you did interfere with other trailers?

A. We talked to them and told them to go back, those we had a dispute with.

[fol. 177] Q. Now you had no quarrel with the trailers coming from New York to Boston. That was all right, wasn't it?

A. At that time, yes.

Q. Those were empties, weren't they?

A. Oh, no.

Q. Now, it was all right in your judgment for trailers to come one way from New York to Boston, but you were opposed to trailers going from Boston to New York?

A. There was a reason for that.

Q. But you were opposed to that. You just answer yes or no.

A. I can't answer in that way.

Q. Let me restate it: you had no objection if the trailers came in from New York to Boston. That was all right, wasn't it?

A. We had no objection?

Q. Yes.

A. We had objection.

Q. But you didn't interfere with it?

A. Because there was a lot of freight there in the hands of the railroad. We wanted our companies to take it back.

Q. So except for these special circumstances, you are also opposed to the bringing of trailers in from New York?

A. Opposed?

Q. Opposed to it, yes. You want to stop that?

A. We want to stop a part of the rail operation and get some of the work if we can, whether it's in from New York or to Boston, that's true.

Q. So you don't care where it comes from, but you want to stop part of it, is that the idea?

A. We want to stop part of the rail operation.

Q. Irrespective of where it comes from or where it goes?

A. Boston to New York and New York to Boston we refer to.

Q. And you want to put a partial embargo on in Boston and a partial——

A. We don't want to put an embargo on.

[fol. 178] Q. What do you call stopping trailers from getting into the yard? What do you call it?

A. Stopping them?

Q. Yes.

A. I don't know what you would call it. It wasn't an embargo.

Q. Well, if you stopped them, wouldn't you say it was an embargo on the shipment of trailers out of Boston?

A. I wouldn't say that because they could go over the road.

Q. Can the New Haven Railroad operate over the road?

A. Yes, by the New England Transportation, which they do now.

Q. Do you know what the operating authority of the New England Transportation Company is?

A. Do I know what their authority is?

Q. Yes.

A. In what respect?

Q. Operating authority.

A. I know they have the rights to run to New York and they do. As a matter of fact, I think we have 4 road drivers out of there.

Q. Is it your statement that the New England Transportation must now discontinue the handling of trailers and all of the stuff must move by New England Transportation over the road?

A. No.

Q. Are you willing to permit the New Haven Railroad to do some trailer transportation on flat cars?

A. Am I willing to permit it?

Q. Sure.

A. Yes.

Q. That's nice of you.

Mr. Burstein: We have no further questions.

Redirect examination:

By Mr. D'Arcy:

Q. As a matter of fact, do you have any interest in what [fol. 179] the railroad does with its business in any way, shape or manner?

A. No interest.

Q. What is your purpose in any activity in which you engaged?

A. To employ and keep men employed in our union, or in our industry.

Q. Have you directed any of your activities at anybody other than motor carriers with whom you have contracts?

A. No, sir.

Mr. D'Arcy: No further questions.

Mr. Burstein: No further questions.

(Witness excused.)

(Conference at the bench between Court and counsel, not taken.)

Mr. Burstein: It is hereby stipulated by and between counsel of the respective parties that if Mr. Norton were

called to the stand, he would give the same answers to the same questions put both on direct and cross examination as in the instance of the preceding witness, Mr. McCarthy.

Mr. D'Arcy: That's right, your Honor.

I have no further witnesses.

Mr. Burstein: Your Honor, I have one rebuttal witness who will be very brief.

Mr. Thompson.

FRANCIS J. THOMPSON, *Sworn.*

Direct examination:

By Mr. Burstein:

Q. Would you please state your full name and home [fol. 180] address?

A. Francis J. Thompson, 25 Winter Island Road, Salem, Massachusetts.

Q. You are a member of the bar of the Commonwealth of Massachusetts?

A. I am.

Q. You are also general counsel for the employers group of the motor carrier industry?

A. That is correct.

Q. And you are the gentleman to whom Mr. McCarthy referred when he said he discussed a certain grievance with St. Johnsbury?

A. That is correct.

Q. Now——

A. That is incorrect as far as any discussion of a grievance with Mr. McCarthy on a St. Johnsbury grievance is concerned. I participated in a case.

Q. He made reference to a particular case before the joint committee and a seventh man, is that correct?

A. That's right.

Q. What did that case involve?

A. That case involved 2 men that were regularly assigned and were denied their assignment that particular night, and they were awarded the pay they would have earned if they had carried out their assignments.

Q. Would it be correct to state that the only issue before the arbitrator was the right of these men to pay because

they had been called in and assigned to a job and then weren't given the job?

A. That's right.

Q. Was the right of an employer to use the trailer-on-flat-car service an issue in that arbitration proceedings?

A. Not the right—no.

Mr. Burstein: I have no further questions.

Mr. D'Arcy: Just a few questions, Mr. Thompson.

[fol. 184] Cross-examination

By Mr. D'Arcy:

Q. I think there is some confusion as a result of the testimony which can be very easily cleared up. Isn't it true that in this particular St. Johnsbury arbitration award, the men involved were assigned pay for not having been given a night road trip because the particular trailer was shipped on the rails?

A. They were paid because they were not given the assignment, as I said, that had previously been given to them.

Q. And the assignment which was going to be given to them was a road trip to New York, is that correct?

A. That's right.

Q. And instead of the assignment being given to these men, the trailers were shipped on flat cars?

A. Yes, I believe they were.

Mr. D'Arcy: All right. That's all.

Redirect examination

By Mr. Burstein:

Q. And if the particular load had been shipped over another motor carrier line, would these men have been awarded a pay for the night because they had been——

A. By another motor carrier?

Q. Yes.

A. That would be in violation of the clause, as we have it, the hiring of other equipment.

Q. The union claim was paid for the night?

A. That's right.

Q. No grievance was asserted with respect to the use of the trailer-on-flat-car service?

A. Not per se.

Q. The argument was that these men were called in and not paid for a night's work and the arbitrator——

A. He awarded the pay they would have received.

Q. Did the arbitrator in his award say the motor carrier may not use the trailer on flat cars?

A. Absolutely not.

[fol. 182] Mr. Burstein: No further questions.

Mr. D'Arey: That's all.

(Witness excused.)

MOTIONS TO AMEND PLEADINGS TO CONFORM TO PROOF

Mr. Burstein: We have no further witnesses and assume counsel for the defendant has no further witnesses.

And at this time, I move to amend our pleadings to conform to the proof.

Mr. D'Arey: May I join in the motion on behalf of the defendants also. I have no objection except that we still have, your Honor, the question of the substituted bill of complaint, which I don't believe is clear on the record.

The Court: We have argued this case in full and heard the evidence, isn't that so?

Mr. D'Arey: Yes, I think so, your Honor.

The Court: Just reversing the usual situation.

Now, you are going to give me your memorandum, are you?

Mr. D'Arey: Yes, your Honor.

The Court: Have you got it with you?

Mr. D'Arey: Yes, your Honor.

I would like to make one statement, which is only a very brief argument, for the record because it is contained in that particular phraseology which I am going to submit to you and so that it will be on the record as well as before you when you see this.

The Court: All right.

[fol. 183] (Conference at the bench between Court and counsel, not taken.)

Mr. D'Arcy: Now may I make my short statement, your Honor?

The Court: All right.

Mr. D'Arcy: It begins: Nor does the foregoing exhaust the jurisdictional issue, your Honor. There is another line of United States Supreme Court cases: Thornhill vs. Alabama, 310 United States 88; American Federation of Labor vs. Swing, 312 United States 321; Bakery and Pastry Drivers vs. Wohl, 62 Supreme Court Reporter, Page 816, and others, in which the United States Supreme Court found state court injunctions to be unconstitutional restrictions on free speech wherein they enjoined peaceful picketing in labor disputes. The defendants are prepared to prove—that's the way this statement is worded, your Honor—that not only was any activity alleged in the bill of complaint peaceful but that it constituted only, purely and simply, speech. The bill of complaint wisely does not allege any violence, mass picketing, breaches of the peace, fraudulent publications or any other unlawful method of activity.

We are prepared to prove that any activity by the defendants does not even warrant the conclusion that there was picketing. I am sure the plaintiffs will admit that there was no carrying of placards or even wearing of the so-called arm bands, the traditional identifying mark of a picket. Thus, your Honor, for the Court to issue a preliminary injunction and to have already issued the temporary restraining order is claimed by the defendants to be and to have been without the jurisdiction of this Court because it would be and has been in violation of the defendants' rights as guaranteed in the Constitution of the Commonwealth of Massachusetts, the First Amendment of the Constitution of the United States, and a violation of the due process of law guarantees of the Fourteenth Amendment of the Constitution of the United States.

We are not unmindful of a rather recent flurry of United States Supreme Court cases, to wit, Giboney vs. Empire Storage and Ice Company, 336 United States 490; Hughes vs. Superior Court of California, 339 United States 460; [fol. 184] Teamsters Union vs. Hanke, 339 United States 470; and Building Service Employees vs. Gazzam, 339 United States 532. We understand these cases to stand

for the propositions that picketing is more than free speech and may be enjoined when for a purpose contrary to state law, whether expressed by the state's courts or legislature. We submit, however, that there has been nothing but speech involved in the instant case and further, that the cases last cited bore no relation to the effect on interstate commerce, the very substance of the plaintiff's bill of complaint.

Thank you, your Honor.

Mr. Burstein: Well, your Honor, I don't have a written reply, but I have cited these cases. There has been a recital here of the principles, and they are inaccurate. The Thornhill vs. Alabama Case has been expressly disclaimed by the United States Supreme Court, and in that case they said picketing is not in all circumstances free speech. Moreover, the state courts here have expressly held that where there is even a labor dispute but an unlawful secondary boycott, there may be an injunction; and even if there is a labor dispute, it must be lawful, and this kind of situation doesn't give rise to a lawful dispute. Why, right within the language of the statute it is plain that this would be an illegal activity even if there is a labor dispute. No one can read Subdivision E of Section 20C without concluding immediately that there is an unlawful secondary boycott here, and Pickett vs. Walsh will indicate that. In the Juno Spruce Company case, decided by the United States Supreme Court recently, one union, the International Longshoremen, said to Juno Spruce: we don't want you to use the International Woodworkers Association, and you must give us all the work. And the United States Supreme Court said that is unlawful. You can't compel an employer to assign all your work to one union.

Now, it is true that we don't come within the National Labor Relations Act, but it is a violation of law for any man to violate the National Labor Relations Act. And when the Board says the railroad is not an employer, it merely means that a railroad can't go to the Board for relief, but that doesn't mean that an outsider can violate the National Labor Relations Act. And in the Juno Spruce [fol. 185] Company case, a judgment in a very substantial amount was upheld in addition to an injunction against the union, which union told an employer: unless you give us all

the work, we will strike you at Puget Sound, we will strike you at Canada and all over.

The whole line of free speech cases emanated from Dean vs. DiLaires, where Judge Brandeis made some comment about free speech embracing the concept of picketing; and then followed Thornhill vs. Alabama, which dealt with a very broad previous restraint on speech, and the United States Supreme Court said that in some circumstances, picketing may be the equivalent of free speech. Then along came Giboney vs. Empire Ice in 336 and then the Teamsters vs. Hanke in 339 and the Building Service Employees vs. Gazzam in 339, and they said what the courts of this state have always said; when there is a public policy, then any attempt by a union to engage in activity which is contrary to that public policy may be enjoined. This has been the state in which that principle has been made. And, your Honor, to argue that these are a flurry of cases is equivalent to the argument that a headless fourth branch of government, an administrative agency elected by nobody, designated by an administrative office in Washington, can tell your Honor that you have no right to rule in this case. That is a monstrosity. That is an absurdity. It violates the most elemental canons of logic, good sense and law.

Now, for myself, your Honor, I want to thank you for your patience. You have been very kind to us. And I know my brother joins me in our appreciation to you for your patience in listening to this long case, your kindness to the witnesses, and your special consideration for counsel.

The Court: All right, gentlemen. I'll take the case.

Stenographer's Certificate to foregoing transcript omitted in printing.

[fol. 186] IN SUPERIOR COURT OF SUFFOLK COUNTY

REPORT OF QUESTIONS OF LAW TO THE SUPREME JUDICIAL COURT UNDER SECTION 9(a) OF CHAPTER 214 OF THE GENERAL LAWS (TER. ED.) AS AMENDED OR REVISED IN THIS BILL IN EQUITY—August 15, 1952.

I deny a motion of the defendant to dissolve a preliminary injunction heretofore issued herein. This being done after

a hearing in which evidence was heard and after making certain findings. The respondents now request me to report the questions of law involved to the Supreme Judicial Court under the provisions of Section 9(a) Chapter 214 of the General Laws (Ter. Ed.) as amended or revised.

I now report the questions of law involved in said rulings aforesaid to the Supreme Judicial Court for determination by a single justice thereof upon the bill, the transcript of the testimony, and the statement of findings of material facts and order denying the motion to dissolve the temporary injunction.

The questions of law involved are two in number:

1. Does this court have jurisdiction of the action?
2. Does the case involve a labor dispute between the parties as defined in Section 20(C) of Chapter 149 of the General Laws?

Jesse W. Morton, Justice of the Superior Court.

[fol. 187] IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

DECREE—Entered September 30, 1952.

This cause came on to be heard and was argued by counsel; and thereupon, upon consideration thereof, it is ordered, adjudged and decreed that the order of the Superior Court dated July 30, 1952, entered in the case #65809 Equity, *New York, New Haven and Hartford Railroad Company vs. Local Union No. 25 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and Others*, that "the motion to dissolve the injunction heretofore issued in this case is hereby denied, and the injunction is to continue in force until otherwise ordered by the Court," (which is in essence and substance an interlocutory decree of preliminary injunction) be, and the same is hereby, affirmed.

By the Court, (Counihan, J.) (S.) Chester A. Doland, Jr., Clerk.

September 30, 1952.

Oct. 16, 1952, Filed by leave of Court and ordered recorded, (Sullivan, J.)

Attest: Leo A. Reed, Asst. Clerk.

[fol. 188] In Superior Court of Suffolk County

Respondent's Appeal—Filed October 16, 1952

Now come the Respondents, each and every of them, and herewith appeal the decree in this matter entered by the Supreme Judicial Court on September 30, 1952 (Supreme Judicial Court No. 68409—Equity).

And further, the Respondents herewith appeal the "Action of the Court on Motion to Dissolve Injunction", entered by this Honorable Court on July 30, 1952, inasmuch as that "Action" has now been found by the Honorable Supreme Judicial Court to be "in essence and substance an interlocutory decree of preliminary injunction".

Respectfully submitted, Stephen J. D'Arcy Jr., Attorney for the Respondents

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In Superior Court of Suffolk County

Motion to Amend Bill of Complaint

The petitioner requests leave to amend its Substitute Bill of Complaint.

This request is made because on December 19, 1952, a decision of the United States National Labor Relations Board in *In re Washington-Oregon Shingle Weavers District Council, et al.*, Case No. 19-CC-42, 101 NLRB No. 203 (Marysville, Wash.) made available to the petitioner a remedy under Section 8(b)(4)(A) of the National Labor Relations Act for the harm suffered by the petitioner from the facts giving rise to this cause of action.

In order to obtain this remedy (which this Court concurrently with the District Courts of the United States has jurisdiction to afford) the petitioner must replead its case [fol. 189] in accordance with request herein made.

By an order of the pre-trial session of this honorable Court the above cause of action is scheduled to be tried on February 10, 1953. To adduce evidence of the facts which support the remedy above referred to, it is necessary for the petitioner to undertake pre-trial examination of representatives of motor truckers which are customers of the petitioner and members of the respondent Union with reference to past collective bargaining associations and the purposes of the respondent Union in coercing, as the petitioner alleges, the petitioner's customers to cease doing business with the petitioner.

Therefore, the petitioner further requests that the trial of the above case be stayed until the pleadings are completed and until, thereafter, the petitioner has had a reasonable opportunity to undertake the pre-trial examination referred to above.

By: W. Q. Keenan, Attorney for the Petitioner.

IN SUPERIOR COURT OF SUFFOLK COUNTY

AMENDED SUBSTITUTE BILL OF COMPLAINT—Filed January 15, 1953

The petitioner respectfully represents to this honorable Court that:

1. The petitioner, The New York, New Haven and Hartford Railroad Company, is a corporation duly organized under the laws of the Commonwealth of Massachusetts, with an usual place of business in Boston, Massachusetts and is engaged as a common carrier in the transportation of freight and passengers by rail in interstate commerce subject to the provisions of the Interstate Commerce Act, Part I (49 U.S.C. Section 1 et seq.) and to the provisions of the Railway Labor Act (45 U.S.C. Section 151 et seq.).

2. The respondent Local Union No. 25 (hereinafter called the "respondent union") of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of [fol. 190] America, is a voluntary unincorporated association of employees organized for the purpose of dealing with

motor carriers concerning terms and conditions of employment of motor carrier employes. It maintains a principal office within the City of Boston and none of the respondent union's members is employed by the petitioner.

3. The petitioner is informed and believes that the respondent, Edward F. Jenkins, is the duly elected and authorized President of the respondent union.

4. The petitioner is informed and believes that the respondent, Michael J. Norton and William J. McCarthy, are the duly authorized and designated Business Agents and delegates of the respondent union.

5. The individual members of the respondent union are too numerous to be joined individually as respondents and this action is brought against each and every member of the respondent union as fully as if each were individually named; the respondents Edward F. Jenkins, Michael J. Norton and Williams J. McCarthy are connected with (as set forth above) and are fully representative of the entire membership of the respondent union.

6. The petitioner is informed and believes that the respondent union is not authorized under the terms of its charter to negotiate with or enter into collective bargaining agreements with the petitioner.

7. (a) Since December, 1937, in the course of performing its duties as a common carrier by rail, the petitioner has transported motor truck semi-trailers (hereinafter called "trailers") on flat cars by rail in interstate commerce (which service is hereinafter called "flat car service"). The petitioner's flat car service is available to the general public and charges for it are assessed in accordance with the provisions of tariffs duly filed with the Interstate Commerce Commission of the United States. The petitioner's flat car service is provided, under contracts of carriage in advance of rendering such service, to two categories of users: (1) motor truck carriers which haul with their own tractors from their own terminals trailers to the petitioner's No. 5 Yard situated in the vicinity of Northern [fol. 191] Avenue, Boston, Massachusetts (hereinafter called "No. 5 Yard") where these trailers are moved by tractors up a ramp and placed aboard the petitioner's flat

cars and whence, thereafter, these flat cars are transported to various points in interstate commerce along the petitioner's line of railroad; and (2) shippers who own or rent tractors and trailers and who load their own shipments into such trailers and transport said trailers to No. 5 Yard where the petitioner renders service in the manner as set forth above.

(b) The petitioner is informed and believes that the personnel who drive tractors which haul trailers to the No. 5 Yard in Boston for transportation by flat car as aforedescribed are members of the respondent union.

(c) There is no agreement, understanding, or arrangement with any employer of members of respondent union or any other employer primarily interested in a labor dispute, pursuant to which petitioner has required or now requires its own employes to perform work or services which would be done by employes of any such employer in the absence of a labor dispute.

(d) The greater part of petitioner's current business, over a representative period, does not consist in the aforedescribed trailer on flat car service.

(e) The greater part of petitioner's current business, over a representative period, does not consist in transporting, handling or otherwise dealing in the goods of an employer engaged in a lawful labor dispute.

8. (a) The petitioner is informed and believes that on July 11 and July 12, 1952, in or about the premises and in the vicinity of the No. 5 Yard, each of the individual respondents and the respondent union coerced, ordered and directed drivers of tractors hauling trailers for transportation via flat car service to refuse to permit the trailers to be loaded upon petitioner's flat cars.

(b) On July 11 and July 12, 1952 by reason of the acts of [fol. 192] the respondents as aforesaid, petitioner was prevented from and was unable to load trailers on its flat cars.

9. (a) The petitioner is informed and believes that on July 14, 1952, the individual respondents and the respondent union ordered and enforced a picket line at the entrance in the No. 5 Yard with the express purpose and design of preventing the petitioner from receiving and loading trailers on its flat cars.

(b) On July 14, 1952 the individual respondents and the respondent union prevented the loading of trailers on flat cars and enforced a boycott against petitioner and a withholding of patronage and services by motor truck carriers and shippers.

9A. The petitioner is informed and believes that in at least two collective bargaining negotiations in the past between the respondent union and employers of members of the respondent union, the respondent union attempted to coerce said employers to agree to limit their use and/or to cease using the petitioner's flat car service; and the petitioner is informed and believes that on numerous other occasions the respondent union has coerced individual employers of members of the respondent union under threat of strike to limit their use and to cease making use of said service, as the result of which coercion said employers have refrained from doing business in whole or in part with the petitioner.

10. (a) The respondents threaten to continue the acts set forth in paragraphs "8", "9", and "9A" of this complaint unless they are enjoined.

(b) The petitioner is informed and believes that the individual respondents and the respondent union will continue to commit the acts complained of in paragraphs "8", "9" and "9A" of this complaint or, with actual knowledge thereof, have authorized, adopted or ratified such acts and threats to commit such acts.

11. (a) The petitioner is informed and believes that the object of the acts committed by the respondents on July 11, [fol. 193] 12 and 14, 1952, as set forth in paragraphs "8" and "9" of this complaint was to force or require the petitioner to cease handling and transporting the products of various shippers and motor carriers who employ petitioner's flat car service.

(b) The petitioner is informed and believes that the object of the acts committed by the respondents and the respondent union as set forth in paragraphs "8", "9" and "9A" of this complaint was to force or require employers of members of the respondent union who are customers of the

petitioner to cease using the services of the petitioner because, to supply those services, the petitioner did not employ members of the respondent union.

(c) The petitioner is not involved in any labor dispute with the respondents or members of the respondent union, nor is petitioner involved in any labor dispute which may exist between respondents and/or members of respondent union and any employer and/or group of employers.

12. The acts committed by respondents and respondent union as set forth in paragraphs "8", "9" and "9A" and threatened to be committed are unlawful in that:

(a) The said acts were intended to and did, in fact, result in a failure by petitioner to perform its common carrier duties as required under the Interstate Commerce Act, Part I; and

(b) The said acts were intended to and did, in fact, result in a breach by petitioner of its contracts of transportation with the shipping public and with motor truck carriers; and

(c) The said acts were and are intended to compel shippers and motor truck carriers to assign work to members of the respondent union and to thereby commit an unfair labor practice in violation of the National Labor Relations Act; and

(d) The said acts were intended to and did, in fact, result in an unlawful secondary boycott in violation of the laws of [fol. 194] the Commonwealth of Massachusetts, and of Section 8(b)(4)(A) of the National Labor Relations Act; and

(e) The said acts were committed by the respondents, acting in concert, with the intention to harm and damage the petitioner, notwithstanding that respondents, neither severally, nor jointly, have or had a direct and immediate competitive interest in the petitioner's business; and

(f) The said acts were committed by respondents and respondents threaten to continue the same for the purpose of securing an arrangement, contract or agreement which will create a monopoly in the transportation of articles or commodities in common use, all in violation of the laws of the Commonwealth of Massachusetts.

13. (a) Unless an injunction is granted, the property of the petitioner will be substantially and irreparably injured, in that:

(i) petitioner's substantial investment and its flat car service will be destroyed; and

(ii) patronage by shippers of other services provided by petitioner related to and/or resulting from its flat car service will be lost; and

(iii) petitioner will be subjected to a multiplicity of suits by shippers under the Interstate Commerce Act and the laws of the Commonwealth of Massachusetts for delays in transportation and for other breaches of contracts of carriage entered into between petitioner, shippers and motor carriers; and

(iv) the transportation equipment which the petitioner devotes to its flat car service is peculiarly adapted to that service and is not useful to the petitioner for other transportation purposes. Since the institution of the petitioner's flat car service, it has invested in the equipment used in this service a sum in excess of three million (3,000,000) dollars. During the twelve (12) months immediately preceding the filing of this com- [fol. 195] plaint the petitioner has invested in capital equipment used in its flat car service approximately one million (1,000,000) dollars. If, as the result of the acts of the respondents herein named, as above set forth, the petitioner loses those shippers who formerly were patrons of its flat car service, this capital investment will be reduced in value to a nominal sum amounting to no more than one-tenth (1/10th) of its original cost.

(b) The damage to petitioner is not compensable in an action at law. Petitioner has no adequate remedy at law.

(c) As to each item of relief that this Court may grant, the injury to the respondents will be less than the injury which petitioner would suffer if injunctive relief is denied.

14. (a) The petitioner is informed and believes that there is no labor dispute either between petitioner and/or its employees and respondents and/or members of respondent union or between petitioner and its employes and motor truck operators, shippers and/or their employes or between

respondents and the members of respondent union and motor truck carriers and shippers and/or their employes who deliver trailers to petitioner's No. 5 Yard.

(b) The petitioner is informed and believes that if there is a labor dispute which gives rise to the acts complained of herein, the said dispute is unlawful, in that respondents seek to compel petitioner and/or motor truck carriers and/or shippers to commit an unfair labor practice in violation of the National Labor Relations Act, by assigning work to its members, and to violate the laws of the Commonwealth of Massachusetts, by creating a monopoly in transportation.

(c) The petitioner is informed and believes that if there is a lawful labor dispute, the acts of the respondents complained of herein constitute an unlawful secondary boycott by reason of the object thereof, as more specifically set forth in paragraphs "8", "9", "9A", "10" and "11" of this complaint.

15. (a) The petitioner has notified the Chief of Police of [fol. 196] the City of Boston of the acts of the respondents hereinabove alleged by serving a copy of this complaint upon him.

(b) Notwithstanding that respondents have denied the existence of a labor dispute, the petitioner has made every reasonable effort to settle by negotiation any alleged dispute which the respondents herein named may or can have.

16. There has been no violence or breach of peace and there has been no need for Police protection, although Police officials have been notified of the unlawful acts committed and threatened.

Wherefore, the petitioner prays that:

I. A preliminary injunction issue, forbidding the persons listed in sub-paragraph A hereof to perform the acts listed in sub-paragraph B hereof.

A. 1. All the respondents;
2. Each of the respondents;
3. All persons acting in aid of the respondents and of each of them;

4. All persons acting in conjunction or in concert with the respondents and with each of them; and

5. All persons acting in concert with the respondents and with each of them.

B. 1. Interferring with the petitioner's business;

2. Persuading, inducing or coercing any person, any group of person, or any corporation, to refrain from transporting between, on the one hand, any trucking terminal or the premises of any shipper and, on the other hand, any freight yard or track of the petitioner located within the geographical jurisdiction of this [fol. 197] Court, any trailer or any motor truck tractor, when the purpose of said transportation is to patronize petitioner's flat car service.

3. Persuading, inducing or coercing any person, group of persons or corporation to refrain from loading or unloading freight of any kind, nature or description from or to trailers, flat cars, box cars or any transportation equipment used or employed by the petitioner.

4. Persuading, inducing or coercing any person, group of persons or corporation to breach any contract to which the petitioner is a party.

5. Threatening with harm any person, group of persons or corporation if the petitioner's business is not interfered with, if transportation such as is set forth in sub-paragraph 2 hereinabove takes place, if loading or unloading such as is set forth in sub-paragraph 3 hereinabove takes place, or if contracts, such as are set forth in sub-paragraph 4 hereinabove, are not breached.

6. Hindering any person, group of persons or corporation from performing transportation such as is set forth hereinabove, in sub-paragraph 2, from executing loading or unloading such as is set forth hereinabove in sub-paragraph 3, or from performing contracts such as are set forth hereinabove in sub-paragraph 4.

7. Persuading, inducing or coercing any person, group of persons or corporation to refrain from or to limit use of the petitioner's flat car service.

II. A permanent injunction forbidding the persons listed in sub-paragraph 1(A) of the prayer hereinabove to per-

form the acts set forth in sub-paragraph 1(B) of the prayer hereinabove.

[fol. 198] III. The petitioner be awarded damages in the sum of one hundred thousand (100,000) dollars.

Respectfully submitted, The New York, New Haven and Hartford Railroad Company.

By W. Q. Keenan, Attorney for the Petitioner.

Duly sworn to by W. Q. Keenan. Jurat omitted in printing.

In Superior Court of Suffolk County

Order Allowing Motion to File Amended Substitute Bill of Complaint—January 23, 1953

Allowed by the Court, (Donahue, J.).

[fol. 199] In Superior Court of Suffolk County

Respondents' Appeal—Filed January 26, 1953

Now come the Respondents, each and every of them, and herewith appeal to the Supreme Judicial Court the allowance by the Superior Court on January 23, 1953, of the Petitioner's Motion to Amend Bill of Complaint and the allowance of said Amended Substitute Bill of Complaint.

By Stephen J. D'Arcy Jr., Attorney for the Respondents.

In Superior Court of Suffolk County

Respondents' Demurrer and Answer—Filed January 26, 1953

Now come the Respondents, each and every of them, and herewith reiterate their Demurrer, heretofore duly filed in this matter, as follows:

1. This Court is without jurisdiction to grant the relief prayed for, and was without jurisdiction to have issued the

temporary restraining orders and/or preliminary injunctions heretofore issued in this matter;

2. The Bills of Complaint fail to set forth concisely and with substantial certainty the facts necessary to state a cause of action upon which the relief sought can be granted.

ANSWER

Now come the Respondents, each and every of them, and without waiving the Demurrer heretofore and herewith filed, answer as follows:

1. The Respondents admit the allegations contained in Paragraph one of the Bill of Complaint.

[fol. 200] 2. The Respondents admit the allegations contained in sentence one of Paragraph two of the Bill of Complaint. The Respondents have no knowledge as to the allegations contained in sentence two thereof and call upon Petitioner to prove the same.

3. The Respondents admit the allegations contained in Paragraph three of the Bill of Complaint.

4. The Respondents admit the allegations contained in Paragraph four of the Bill of Complaint.

5. The Respondents admit the allegations contained in Paragraph five of the Bill of Complaint.

6. The Respondents deny the allegations contained in Paragraph six of the Bill of Complaint and call upon Petitioner to prove the same.

7. The Respondents have no knowledge concerning the allegations contained in Paragraph seven, subsections (a), (c) and (e), and call upon Petitioner to prove the same. The Respondents, in accordance with the allegations of subsection (b), admit that some of the personnel therein mentioned are members of the Respondent Union but expressly deny that all such personnel are members of the Respondent Union. The Respondents admit the allegations contained in subsection (d).

8. (a) The Respondents deny the allegations contained in Paragraph eight, subsection (a), and call upon the Petitioner to prove the same.

(b) The Respondents deny the allegations contained in Paragraph eight, subsection (b), and call upon Petitioner to prove the same.

9. (a) The Respondents deny the allegations contained in Paragraph nine, subsection (a), and call upon the Petitioner to prove the same.

(b) The Respondents deny the allegations contained in Paragraph nine, subsection (b), and call upon Petitioner to prove the same.

[fol. 201] 9A. The Respondents deny the allegations contained in Paragraph nine A and call upon Petitioner to prove the same.

10. (a) The Respondents deny the allegations contained in Paragraph ten, subsection (a), and call upon Petitioner to prove the same.

(b) The Respondents deny the allegations contained in Paragraph ten, subsection (b), and call upon Petitioner to prove the same.

11. (a) The Respondents deny the allegations contained in Paragraph eleven, subsections (a), (b) and (c) and call upon the Petitioner to prove the same.

12. (a) The Respondents have no knowledge of the allegations contained in Paragraph 12, subsection (a), as to the result alleged, and call upon Petitioner to prove the same. Further, the Respondents deny said allegations as to the intent alleged and call upon Petitioner to prove the same.

(b) The Respondents deny the allegations contained in Paragraph twelve, subsections (b), (c), (d), (e) and (f), and call upon Petitioner to prove the same.

13. (a) The Respondents deny the allegations contained in Paragraph thirteen, subsection (a) (i), (ii), (iii) and (iv) of the Bill of Complaint and call upon Petitioner to prove the same.

(b) The Respondents have no knowledge of the allegations contained in Paragraph thirteen, subsection (b), of the Bill of Complaint and call upon Petitioner to prove the same.

(c) The Respondents deny the allegations contained in Paragraph thirteen, subsection (c), of the Bill of Complaint and call upon Petitioner to prove the same.

14. The Respondents deny the allegations contained in Paragraph fourteen, subsections (a), (b), and (c), of the

[fol. 202] Bill of Complaint and call upon Petitioner to prove the same.

15. The Respondents have no knowledge of the allegations contained in Paragraph fifteen, subsections (a) and (b), of the Bill of Complaint and call upon Petitioner to prove the same.

16. (a) The Respondents admit the allegations of Paragraph sixteen of the Bill of Complaint insofar as it is alleged that there has been no violence or breach of the peace and no need for Police protection.

(b) The Respondents have no knowledge of the allegation that Police officials have been notified and call upon Petitioner to prove the same.

(c) The Respondents deny the allegation that unlawful acts have been committed and threatened and call upon Petitioner to prove the same.

17. And further answering the Respondents aver that all their activities consisted of the exercise of free speech within the protection of the Constitution of the Commonwealth of Massachusetts and the First and Fourteenth Amendments to the Constitution of the United States.

18. And further answering the Respondents aver that all of their activities were in furtherance of their aims in a lawful labor dispute between the Respondent Union and various Employers (motor carriers) with whom the Respondent Union has collective bargaining agreements and for whose employees the Respondent Union is the recognized collective bargaining agent.

19. And further answering the Respondents aver that the lawful labor dispute hereinbefore referred to was under investigation by the National Labor Relations Board when the preliminary injunction was issued in this matter.

[fol. 203] 20. And further answering the Respondents aver that all of their activities are within the protection of Sections 7 and 8, subsections (a)(1)(5) of the National Labor Relations Act; and General Laws Chapter 150A, the so-called State Labor Relations Act.

21. And further answering the Respondents aver that none of their activities were directed at or to the Petitioner or any of its agents or employees; and that the object of Respondents' activities was not to force or require the Peti-

tioner to do or perform any act, or to cease to do or perform any act.

22. And further answering the Respondents aver that the object of all their activities was to require the various Employers (motor carriers) to perform their collective bargaining agreements and or to bargain collectively in good faith under the National Labor Relations Act, as more specifically set out in Paragraphs "18," "19" and "20" above.

Wherefore, the Respondents pray that:

I. The restraining orders and injunctions heretofore issued and continued be dissolved.

II. The Petitioner's Bill of Complaint be dismissed.

III. The cause be retained in order that damages, including all reasonable costs (together with a reasonable attorney's fee) and expense of defense, be assessed in favor of Respondents in accordance with the provisions of Massachusetts General Laws Chapter 214, section 9A, subsection (2) as amended by Section 3 of Chapter 452 of the Acts of 1950.

Respectfully submitted, Stephen J. D'Arcy Jr., Attorney for the Respondents.

[fol. 204] In Superior Court of Suffolk County

Interlocutory Decree on Demurrer—Entered March 2, 1953

This cause came on to be further heard at this sitting upon the demurrer of the defendant, and was argued by counsel; and thereupon, upon consideration thereof, it is Ordered, Adjudged and Decreed that said demurrer be and hereby is over-ruled.

By the Court, (Giles, J.), Mary G. Murphy, Asst. Clerk.

In Superior Court of Suffolk County

Respondents' Appeal—Filed March 20, 1953

Now come the Respondents, each and every of them, and herewith respectfully appeal to the Supreme Judicial Court

from the action of the Superior Court on March 2, 1953 overruling Respondents' Demurrer.

By Stephen J. D'Arcy Jr., Attorney for the Respondents.

In the above entitled case, at the hearing of the same it is ordered by the presiding justice (Giles J.) that William H. Keyes be, and he hereby is, designated to report the testimony in said case, to the Supreme Judicial Court.

Attest: Mary G. Murphy, Asst. Clerk.

March 2, 1953.

[fol. 205] In Superior Court of Suffolk County

Transcript of Testimony—Filed May 5, 1953

Appearances: Herbert Burstein, Esquire, for the Plaintiff.

Stephen J. D'Arcy, Esquire, for the Defendants.

Boston, Mass.
March 2, 1953.

Mr. Burstein: May it please the Court, both counsel respectfully request that Your Honor appoint the court stenographer a Commissioner to report the evidence to the Supreme Judicial Court.

The Court: Yes, he is appointed.

Mr. Burstein: And Your Honor, there was a preliminary hearing on an application for a preliminary injunction, and both counsel have stipulated that the evidence produced on the application for a temporary injunction be offered in evidence in this trial and be made part of the record together with the records in evidence.

The Court: All right.

. . . . . .

EDWARD F. JENKINS, Sworn

Direct examination.

By Mr. Bursfein:

Q. Will you please state your full name and home address?

A. Edward F. Jenkins, 399-A West Broadway, South Boston.

Q. Mr. Jenkins, you are here pursuant to a subpoena which the Petitioners served upon you?

A. That's right.

Q. You have been President of the defendant Local No. 25 for approximately three years, isn't it?

A. Correct.

[fol. 206] Q. Prior to that time for approximately three years you were business agent?

A. Correct.

Q. And prior to that time you were employed by the Local No. 25?

A. Correct.

Q. Did you testify on or about July 24, in connection with the application for a temporary injunction, that for many years you had been employed on the Union Wage Scale Committee for negotiating contracts with employers, employer members of Local No. 25?

A. Right.

Q. And you were a member of the Union Negotiating Committee in 1946?

A. Yes.

Q. Is it the practice of the Union through its Negotiating Committee to prepare and draft contract proposals for submission to members in advance of the actual negotiating?

A. Yes, sir.

Q. Is it the Union's practice to review those proposals with the members of the Union before submitting them at a membership meeting?

A. Yes, sir.

Q. And when the members approve the proposal I take it, it is then submitted to the employers?

A. Yes.

Q. Did you testify that in 1946 prior to the Negotiating Conference working towards a new agreement, the Union submitted to the employers the following proposal? I read now from the record, Page 156. Incidentally, the proposals are in evidence and will be before Your Honor. "It is agreed that employers will not engage other equipment while they have available equipment of their town. When necessary to hire equipment, it is agreed that in order to assist in giving employment to members of Local 25 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America and/or to reduce the idle equipment burden of those employers signatory hereto, that such employers shall hire said equipment as follows: from employers likewise signatory to this agreement [fol. 207] when such employers are able to furnish said equipment. Movement by rail 'flat car' cannot be used while employers have available equipment of their own." Do you recall that as to one of the proposals?

A. My answer would be Yes.

Q. I take it that in connection with the practice which you described, that clause among the others contained in the total proposals submitted to the employers, was discussed with the membership before submission?

A. Submitted by the membership, Yes.

Q. When the contract was signed in 1946 I recall you testified, or do you recall testifying that that clause was not contained in the collective bargaining agreement?

A. It wasn't contained?

Q. Was not contained in the collective bargaining agreement?

A. I don't recall.

Q. Do you recall testifying as follows:

> "Q. Now Mr. Jenkins, I show you Plaintiff's Exhibit #4—that was the 1946 agreement, and I call your express attention to Article VII, the contract that was negotiated after these proposals were submitted, and I ask you whether or not the proposal to eliminate rail-flat-car service was not itself eliminated from the contract?

A. What article is that that you are referring to now?

Q. Article VII.

A. Yes, it has been eliminated."

Do you recall testifying to that?

A. No, I don't.

Mr. Burstein: Will counsel stipulate—it is in evidence—will counsel stipulate that the provisions relating to rail-flat-car was eliminated from Article VII?

Mr. D'Arcy: As a matter of fact, Mr. Burstein, to the entire line of questioning, I think it is already in the record. It has been stipulated as having been in evidence already, all the questions and answers.

[fol. 208] Mr. Burstein: Will Your Honor look at,—that in each of these contracts, or some of the contracts prior to 1946, reference was made to leased equipment?

Q. Do you recall that?

A. Yes.

Q. And I take it that the language which I just read to you relating to leased equipment, exclusive of the sentence starting "Movement by rail 'flat car' cannot be used while employers have available equipment of their own," exclusive of those words the reference to leased equipment was contained in the preceding contract?

A. Yes, sir.

Q. In 1946 for the first time reference was made to the rail flat-car?

A. I don't recall for the first time.

Q. But in any event you do recall that prior to 1946 reference for leased equipment with the exclusion of the words "Movement by rail flat-car," was contained in the earlier agreements?

A. Yes, sir.

Q. Before negotiating the agreement which eliminated the reference to flat cars, did you advise your membership what kind of contract you had negotiated on their behalf at a membership meeting of carriers?

A. Always done in advance for ratification.

Q. And the members ratified the agreement of 1946?

A. Yes.

Q. In 1949 you were also a member of the Wage Scale Committee for the Union?

A. 1949? I believe I was.

Q. And prior to the negotiations the Union, as in the instance of the 1946 contract, prepared and submitted a series of proposals; do you recall that?

A. That's part of the procedure.

Q. And in submitting these proposals I take it the Union followed precisely the procedure which had been adopted in the 1946 contract, namely, the matter of measures for preparation of these proposals and submission to the members?

A. Yes, sir.

[fol. 209] Q. Did you testify that in 1949 the following proposal was made, interposing Article VII, "Movement by rail 'flat cars or ships- cannot be used while employers have available equipment of their own or employees on the seniority list not working?" Do you recall that was one of the proposals?

A. Yes, sir.

Q. I take it that you discussed that proposition with the membership before the submission of the series of proposals?

A. Yes.

Q. When the contract was written, that clause I have just read to you was not contained in the final contract?

A. No.

Q. But the clause referring to leased equipment continued in the contract?

A. Yes.

Q. And that was the clause which was in the contracts for some time prior to 1946? I show you Article VII of the Agreement of 1949, which I believe, Your Honor, is Exhibit #6 in evidence. I can check that in one minute. Exhibit #6, Article VII.

A. What is the question?

(Question repeated by reporter.)

A. Yes.

Q. Before concluding the contract negotiations and executing the collective bargaining agreement, I take it you

reported to the membership as you did in the instance of the 1946 agreement?

A. Yes.

Q. And the membership ratified the agreement?

A. Yes.

Q. Did you testify on July 24 that there had never been a prohibition against the use of flat cars contained in any agreement made by Local No. 25?

A. I don't recall.

Q. I show you your testimony on Pages 159 to 160. I ask you if this refreshes your recollection?

A. My answer to that would be my observation.

Q. I will have to ask the reporter to read the question back?

[fol. 210] (Question repeated by reporter.)

A. That would be my observation.

Mr. Burstein: Your Honor, for the purpose of clarity, perhaps we ought to ask that the record be marked Exhibit #8, so that we can refer to it.

The Court: All right, it may be.

(Transcript of testimony at prior hearing marked Exhibit #8.)

Q. In addition to your office as President of the Union, the Union also has a Vice-President and Secretary.

A. That's right.

Q. In addition to Vice-President and Secretary and yourself there are four business agents?

A. Correct.

Q. And the agents are assigned to different areas or barns; isn't that the procedure?

A. That has been the procedure.

Q. Did you testify that Mr. Norton and Mr. McCarthy were the delegates assigned by the Union to the New Haven Railroad Yard #5, that is, the yard where the flat car service is performed?

A. That's part of their route.

Q. That is to say, that in addition to the barns or employers' places of business which they cover, they are also assigned to Yard #5, is that correct?

A. Yes.

Q. Did you testify as part of the duties of Norton and McCarthy, it was their function and they took up any grievance or complaint which arose in their area?

A. Yes.

Q. And that you held a kind of consultative capacity with respect to the area in which they operated?

A. More or less.

Q. Now, had you and the business agents discussed the problem of the trailer-on-flat-car service at any time during [fol. 211] the period 1947 and 1952?

A. Yes, we talked about Article VII in the contract on many occasions.

Q. And did you arrive at any plan of procedure for handling that problem, Yes or No, please?

A. No.

Q. You had never arrived at any plan of procedure. Well, it is a fact is it not, that in 1949 you had submitted a contract proposal to eliminate the flat-car service? That's a fact?

A. That's right.

Q. And was that one of the plans or proposals which had been adopted as a result of conferences held by you and other agents?

A. No. My answer would be No.

Q. Who developed that proposal?

A. What proposal?

Q. The proposal contained in the 1949 agreement?

A. The members of Local No. 25.

Q. The members submitted it on the floor; the delegates presented it?

A. That's right.

Q. I take it at the time that it was proposed, the one I read to you, the business agents and yourself were present at the meeting?

A. Yes.

Q. Did you testify as follows:

"Q. Mr. Jenkins, in connection with what the union would like to accomplish in this dispute, is it not true that the union would like to secure all of the work of driving these trailers?

A. We would like to secure all of the work."

Do you recall that testimony?

A. Yes.

Q. Was that part of the plan and policy of the union?

A. According to articles described in the contract, Yes.

Q. Is that according to your understanding of the union's [fol. 212] rights, it was the union's policy and plan to secure all of the work which was going on flat-cars?

A. Providing we, the employers had equipment.

Q. Providing the employers had equipment. So that it was the union's policy, the union's position, that if the employer had equipment, these tractor and trailer units, then all of his work had to be delivered by his own men over the highway rather than over the railroad?

A. That would be my interpretation according to the contract, Article VII in the contract.

Mr. Burstein: I am afraid I must move to strike that as not responsive.

The Court: It may go out.

Q. May I have an answer to that question?

(Question repeated by reporter.)

A. Yes.

Q. As a practical matter the union worked out arrangements with individual carriers respecting the sharing of the work, isn't that so?

A. I don't know what you mean.

Q. I say to you the union's position is that if an employer had enough equipment, all the work had to go over the highway, and I say to you as a practical matter the union worked out a practical arrangement with individual carriers with whom they had contracts for that proportion and the overflow went on the rails?

A. Yes.

Q. Notwithstanding that the union's position was that it was entitled to all the work if the employer had equipment available, did you testify that the union insisted that its members get a share of the work?

A. I don't recall that.

Q. I show you your testimony on Page 180, 178, in

Exhibit #8, and ask you if that refreshes your recollection?

A. Yes.

[fol. 213] Q. So that notwithstanding the union's position that it was entitled to all of the work, as a practical matter the union insisted on getting a share of the work?

A. Yes.

Q. I take it that each agent worked out these arrangements in his own area where he had jurisdiction of where he was assigned?

A. Not in my time.

Q. When was your time?

A. Prior to me coming into office.

Q. Was that prior to the time you were a business agent?

A. Yes, sir.

Q. But you do recall that the arrangements had been worked out?

A. That's right.

Q. These informal understandings which we have just referred to, were not written into the major agreement, but it was just an understanding between the union and the,—the union agent and the employer, is that correct?

A. As far as I know.

Q. Your answer is, as far as you know it is correct?

A. That's right.

Q. And as far as you know Mr. Jenkins, were the stewards, shop stewards and representatives employed in the carrier's place of business, informed of these arrangements?

A. I think.

Q. A shop steward is a representative of the union, is he not, on the job?

A. That's right.

Q. And he is appointed by the union?

A. Were elected by the union.

Q. Is it the practice of the union to advise the shop steward about union policy so that he may enforce the contract and see to it that the arrangements made are lived up to?

A. A shop steward is governed by the constitution and by-laws.

[fol. 214] Q. Do you have a copy of the constitution and by-laws?

A. No.

Q. Based on your knowledge of the constitution and by-laws, will you please instruct us and tell us whether or not the steward's function isn't to carry out the terms of the collective bargaining agreement and see that the arrangements between the employers and employees are observed?

A. Yes, that's his job.

Q. So that if an informal arrangement was worked out between the union or union agent and the employer, it would be the practice to instruct and advise the steward about it so that he might see that those obligations on the part of the employer were lived up to?

A. That would be my practice.

Q. That would be, I take it, the practice of the union generally?

A. I expect so.

Q. Did you testify that at the outset of these informal arrangements that the railroad was to get the overflow which the union drivers couldn't handle? Is that question clear to you?

A. Yes. My answer would be Yes.

That's correct, isn't it?

A. Yes.

Q. At the outset, therefore, if an employer had a certain amount of work and all of his drivers were occupied, then any overflow of business would go to the rails?

A. Yes.

Q. That was the nature of the understanding at the outset?

A. As far as I know.

Q. Did you ever talk to anybody about that?

A. No, I did not.

Q. But you learned of it in the course of your duties as President in the earlier days?

A. When the rail came into its own that was negotiated. That was before my time.

Q. You learned of that arrangement when you became an agent?

A. That's right.

[fol. 215] Q. Or when you became an officer of the union?

A. Yes.

Q. So that we will have this clear.

The Court: We will take the morning recess now.

(A. M. recess.)

Q. Mr. Jenkins, this arrangement we have just discussed and which you said you had no personal knowledge of but which you learned during the course of your duties as an agent and subsequently as an officer of the trade union, was made sometime before the time when you became an officer of the union?

A. That's right.

Q. To the best of your knowledge when you became a delegate and ultimately the president of the union, those arrangements were pretty generally observed as they had been made in the previous years?

A. Pretty generally.

Q. Would it be possible for you to tell the Court, Mr. Jenkins, when you first learned of this informal arrangement we have just described?

A. Away back when I was driving a truck.

Q. That would be some possibly ten or fifteen years ago?

A. In around that time.

Q. So that then we can understand it very clearly, if all of the men employed by a particular barn or employer were occupied, then the union had no objection if the railroad got the excess or overflow?

A. We wanted them according to Article VII to get the extra work to people having a signed contract.

Mr. Burstein: I ask that be stricken.

The Court: That goes out.

(Question repeated by reporter.)

A. Yes.

[fol. 216] Q. The union then had an objection if the railroad got an overflow?

A. Yes.

Q. So that the union didn't want the railroad to haul anything?

A. We wanted,—can I elaborate?

Q. No, you must answer my question Yes or No. Let's take the particular barn where there are four drivers and there are six trailers, four horses or tractors. If the barn had six trailer loads of freight and if all the four men employed were assigned to tractor-trailer units for driving over the highway, then the union have no objection if the two excess trailers went on the flat cars, is that right?

A. Yes, we have an objection.

Q. You had an objection. Now then, you object to the railroad getting any of the excess?

A. No.

Q. Then you don't object if the railroad got the overflow?

A. I don't,—you don't make yourself clear.

Q. Didn't you testify that you were satisfied if the union got a share of the work and the railroad got a share of the work?

A. Yes.

Q. So that if there was an overflow or an excess of, or so that all of the drivers were actually employed, you had no objection if the balance of the trailers went on rails, is that what you mean?

A. I will have to say No.

Q. You had an objection if the railroad got part of the work or you had no objection to it?

A. We had no objection as long as our people are all employed.

Q. That wasn't the question I put to you. In the particular barn, if all of your people are employed, you would have no objection if the barn sent out additional trailers over the flat-cars?

A. If all of our people were employed.

Q. You mean all the people in the union?

A. All the people in the particular barn.

[fol. 217] Q. In the barn? All right. Let's see if we understand each other. If all the people in the barn were employed,—who were members of the union were actually employed, then you had no objection if the balance of the freight went over the rails?

A. No, no objection where it went.

Q. But you didn't care if it went on the rails?

A. Yes.

Q. So that your understanding of the arrangement, or the understanding of the union was that if all the men in the barn who were members of Local No. 25 were working, then you had no objection where the excess trailers went?

A. Right.

Q. And you had no objection if they went to the railroad?

A. Other than we would like to have them go to the people who have signed contracts with us.

Q. But aside from that you had no objection if it went on the rails?

A. No.

Q. So far as the union went, if all of your men were not employed, then the union had an objection to the trailers going over the flat-cars?

A. That's right.

Q. Let's stop there. Does your contract, and speaking of your knowledge, guarantee employment to any member of Local No. 25?

A. No.

Q. No guarantee. And the wage rate in your contract is a daily wage rate, isn't it?

A. That's right.

Q. And the men shape every morning before they get an assignment?

A. Correct.

Q. The men are also on seniority, so that if a barn has ten men and there is work only for eight, of course only the seniority can work, and the two men on the bottom, because of the seniority rating, will not be paid for that day?

A. Right.

[fol. 218] Q. So that nobody in the barn is guaranteed that he will go to work, isn't that rgiht?

A. No, only by virtue of their seniority.

Q. And if all the men went to work, all the men on the seniority list go to work, that you don't care what the employer does with the excess trailers, if he didn't have equipment for them?

A. I don't care what he does with them if they are trucked to somebody who has them.

Q. Is it your statement, if a barn has, let's say eight men and ten tractors, or has ten trailers, this plant has ten trailers ready and all of the eight men on the seniority list are employed, is it your statement that he can't send the other trailers over the rails but must give them to some other carrier with whom Local No. 25 has a contract?

A. My answer would be Yes.

Q. Your anwser is that your understanding of this agreement is that he can't give it to the railroad?

A. That's right. We don't have any issue with the railroad.

Q. You have no dispute with the railroad? Let's get that clear, and I would like to go over that same point. Take that same carrier with ten trailers, with freight sufficient to hold ten trailers, and eight drivers on the seniority list; all eight drivers are now employed transporting or delivering trailers over the highway, the employer has two additional trailers; is it your understanding that the union requires the employer to give the work contained in those two extra trailers to some other motor carrier with whom Local No. 25 has an agreement?

A. Yes.

Q. Is that your understanding with other carriers?

A. Yes.

Q. That is an understanding you arrived at with motor carriers?

A. Yes.

Q. With which motor carrier have you now such arrangements?

A. The Grant Company, against who we are going up on the contract.

[fol. 219] Q. What are you taking up?

The Court: I take it there is an action.

Q. With which motor carriers did you make an arrangement under which a motor carrier who has excess trailers, having employed all of his men, must turn over those excess trailers to another party, another motor carrier who is signatory to your collective bargaining agreement?

A. I think I said I did not care who he gives it to, as long as he gives it to somebody who had a signed contract with Local No. 25.

Q. Then you had an objection in that case, using that case again for the purpose of illustration. In that case, if the employer took the two trailers and put them on flat-cars, you had an objection to that?

A. No.

Q. It is a fact, is it not, that the railroad has no contract with Local No. 25?

A. That's right.

Q. Didn't you just say that you didn't care who he gave the two trailers to so long as it was somebody with whom Local No. 25 had a contract?

A. That's right.

Q. Didn't you also say that you didn't care if he gave the two trailers to the railroads?

A. That's right.

Q. Now, will you please tell us again, if this employer has two excess trailers, does the union have any objection if they turn the two trailers over to the railroad?

A. No.

Q. For transportation on flat-cars?

A. No.

Q. So that you don't require that he give the two trailers to other carriers, contract signatories or co-signers to the labor agreement?

A. We require it, yes.

Q. Is that your understanding with the motor carriers?

A. According to the contract.

[fol. 220] Q. Let's get this clear. If this motor carrier had two additional trailers after having employed all of the eight men, does the union object if those additional trailers go over the flat-cars?

A. No.

Q. No objection?

A. No.

Q. Because that was the understanding, that the excess would go over the flat-cars?

A. Yes.

Q. That was the understanding that you had with the motor carriers?

A. Well, we have,—can I elaborate?

Q. No. Your answer is Yes or No.

The Court: Mr. Jenkins, we have to proceed according to the rules of evidence. Perhaps your counsel will ask that.

(Question repeated by reporter.)

A. Yes.

Q. Now Mr. Jenkins, you testified that you wanted the carrier in the instance which I posed to you, to turn over those excess trailers to a motor carrier who was a signatory to the Local No. 25 contract?

A. Yes.

Q. I call your attention to your testimony which you gave at a prior hearing.

"Q. You know as a matter of fact, that a portion of that work has always gone by flat-car, isn't that right?

A. A portion?

Q. A portion of the work has always——

A. At the outset it was supposed to be the overflow that we couldn't handle.

Q. But you know a portion has always gone by flat car?

A. Yes."

Is that correct?

A. Yes.

[fol. 221] Q. And still correct?

A. Yes, sir.

Q. Isn't it a fact that after this informal arrangement was made that the demands of the union increased and were changed? When I speak of demands I mean in terms of the use of flat-cars.

A. Yes.

Q. In the prior testimony did you give the following answer to the following question?

"Q. Mr. Jenkins, in connection with what the union would like to accomplish in this dispute, is it not true that the union would like to secure all of the work of driving these trailers?

A. We would like to secure all of the work."

Is that correct?

A. Yes.

Q. Am I correct when I state that at the outset the union's understanding was that the motor carriers would only handle their overflow on the flat-cars, is that correct?

A. Well, I can't talk away for——

Q. I am asking your understanding?

A. My understanding, yes.

Q. But at the time of the dispute in July 1952, at that time the union wanted to get all the work?

A. No.

Q. Isn't that what you stated in your,—in response to my question on Page 192, and I show you your testimony to refresh your recollection?

A. The question now?

(Question repeated by reporter.)

Q. At the time of the dispute was it the position of the union that it wanted to get all the work?

A. Yes.

Q. I want to come back to another concrete example and perhaps you can help us. Suppose a company, one of the carriers in this area, has four tractor-trailer units and three men, under the original arrangement which you learned of [fol. 222] and which you personally did not participate in but of which you have knowledge, the union would not have had any objection, or had no objection if one of the trailers went over the flat-car so long as two of, or three of the men were given work?

A. Yes.

Q. That was pretty generally the pattern which had been followed by the carriers to the best of your knowledge?

A. I would say Yes.

Q. Take the same case that I just gave you. If the motor

carrier sent out two trailers by flat-car, so that only two of the three men got work, the union would have a beef, wouldn't it?

A. Yes.

Q. When I say a beef I mean a grievance. And in that case the union will require that the employer give the man a day's pay or the pay for the trip?

A. Yes.

Q. That has been generally the practice of the union when there has been violations of these informal understandings?

A. Yes.

Q. It is a fact, is it not, that in some instances delegates have worked out arrangements under which if more than a certain amount of trailers went by flat car, the motor carrier would have to add another piece of equipment, and I am asking this of your own knowledge?

A. I don't have knowledge.

Q. Do you know of any case in which the union has worked out arrangements with the motor carrier under which if the motor carrier sent more than a given number of trailers over the rails by flat-car, the motor carrier agreed to add an additional piece of equipment, using of course, all the equipment of the railroad, and therefore, your best remembrance of that?

A. I don't recall.

Q. You don't recall whether such arrangements have or have not been made?

A. That's right.

Q. But isn't it a fact Mr. Jenkins, and again by your own knowledge of what has occurred in the union, where a carrier has exceeded his use of the flat-cars, that is, where he has done more than the overflow, there have been complaints [fol. 223] and have been work stoppages, to the best of your knowledge?

A. I would say there was.

Q. Were you and other agents and delegates criticized by the members for succeeding in the procuring of eliminating trailer-on-flat-car service?

A. Yes.

Q. Did you hear Mr. McCarthy testify, Page 205 of Exhibit #8, as follows:

"Q. Have you had complaints from your members?
A. Oh, yes.
Q. Concerning this problem?
A. Yes, I had complaints from our members many times. We get them every day, especially on this. Where road drivers are held over or held in, the minute they are held in they call us up. As a matter of fact, they go to the flat cars themselves and look the situation over and come back and tell us about it."

Did you hear him testify to that?
A. I don't recall.
Q. I show you the record and ask you if it refresh your recollection?
A. It seems to me I recall it now.
Q. Is that a correct statement?
A. Yes.
Q. To the best of your knowledge?
A. Yes.
Q. I take it that the members or the delegates took some action about this thing when they complained?
A. Yes.
Q. As a matter of fact, wasn't the trailer-on-flat-car an issue in the recent union election?
A. Could have been.
Q. Yes or No?
A. Yes.
Q. Do you believe so or do you think so?
A. I believe it was.
[fol. 224] Q. It was an issue. In the recent election, Mr. Jenkins, you were successful were you, in being reelected as President?
A. Yes, sir.
Q. You had a little opposition though, didn't you?
A. Yes.
Q. Do you know of a gentleman by the name of Peter Commonduros?
A. Yes, sir.
Q. He was a member, wasn't he?

A. Yes.

Q. Did you ever see a pamphlet that Mr. Peter Commounduros distributed?

Mr. Burstein: I ask that this be marked for identification.

(Pamphlet marked Exhibit #9.)

Q. Do you know Mr. Peter Commounduros?

A. Yes.

Q. He was a shop steward at St. Johnsbury?

A. Yes.

Q. For about five years?

A. Yes.

Q. A union shop steward elected or designated by the union?

A. Yes, sir.

Q. And he was familiar,—I take it he would be familiar with the attitude of the members of the union on trailer-on-flat-car service? He would be familiar?

A. Yes.

Q. He attended union meetings I take it, at which time this matter was discussed?

A. Yes.

Q. Now, let me read the following from a statement by Mr. Commounduros, Exhibit #9. "For the past five years I have been a steward in St. Johnsbury. . . . In the past I have fought and will continue to fight for the abolition of 'piggyback trucking,' i.e., moving loaded trailers on railroad flat cars. This is an 'unholy marriage' between the railroad and truck owners that seriously affects the long-haul business. We need an unyielding leader in future contract nego-[fol. 225] tiations between the local and truck owners to eliminate this condition." Now, when Mr. Commounduros makes reference to 'piggyback trucking,' he is referring to this trailer-on-flat-car service?

A. I don't know.

Q. Then I will show it to you and ask you to read it and tell us whether or not 'piggyback trucking,' is a phrase used in one of the circulars to describe trailer-on-flat-car service?

A. I expect according to the language, yes.

Q. Mr. Commounduros was a member of the Wage Scale Committee?

A. Not in my time.

Q. When he speaks of fights against trailer-on-flat-car service, I take it it is in reference to discussions at union meetings and contract negotiations which had been employed in 1946 and 1949?

A. That would be possible.

Q. I believe you testified, and correct me if I am in error, that Mr. McCarthy and Mr. Norton had jurisdiction so to speak, or were assigned to work at Yard #5 on July 11 to 14?

A. That's part of their routine duty.

Q. Now, McCarthy and Mr. Norton are kind of oldtimers in this business, aren't they?

A. Yes.

Q. They have had a considerable amount of experience, haven't they?

A. Yes.

Q. How long have they been business agents?

A. I think Norton for nine years and McCarthy for six.

Q. And to the best of your knowledge they are familiar with the union's rules and regulations?

A. Yes.

Q. And they are familiar with what their own authority is?

A. Yes.

[fol. 226] Q. Would it be fair to say that a union delegate has the authority or it is within the scope of his authority to handle grievances on the job which he is assigned?

A. To handle the business of the organization.

Q. Handle the business of the organization and take such steps as are necessary to correct grievances?

A. Yes.

Q. And that would be part of the duties of McCarthy and Norton?

A. Yes, sir.

Q. That would be part of their duties to handle grievances and adjust disputes and so forth?

A. Yes.

Q. And if they did that, that would be within the scope of their authority as business agents?

A. Yes.

Q. Now, you learned of the work stoppage at Yard #5 for the first time on July 11, when some gentleman as I recall working for another company, told you about it. You didn't learn it directly from McCarthy and Norton on July 11?

A. I don't recall.

Q. When did you first learn of the work stoppage?

A. I know I learned about it the latter part of the afternoon.

Q. Of July 11?

A. I don't recall the date.

Q. That would be the first day of the work stoppage. And you were down at Yard #5 at about 4 or 5 P.M. that day?

A. That's right.

Q. On the first day?

A. That's right.

Q. I believe you testified that when you got there you saw several men around and you saw some activity at that time, and McCarthy and Norton were there?

A. That's right.

Q. Did you testify that where an agent, business agent, believes that there is a violation of an agreement, he has the authority to institute a work stoppage but not a strike?

A. Yes.

[fol. 227] Q. So that if an agent was confronted with a grievance or what he thought was a violation of the contract, he does have the authority to institute a work stoppage but not a strike?

A. Yes.

Q. Did you hear Mr. McCarthy testify as follows, Page 211?

> "Q. Did you think that the employers were violating their agreement by handling the flat cars?
>
> A. In this case I do, yes.
>
> Q. You do. And as business agent, when you think there is a violation of the agreement, you can engage in the activity which you engaged in on July 11? Is that your power as business agent?
>
> A. In this case, yes."

Do you recall that testimony?

A. It seems to me I do.

Q. Is that a correct statement?

A. Yes.

Q. When you met McCarthy and Norton,—when I say McCarthy and Norton I should like to put on the record that I don't mean them any disrespect, to Mr. McCarthy and Mr. Norton, but for simplicity I refer to them as McCarthy and Norton,—when you met McCarthy and Norton on July 11, did you inquire about the work stoppage?

A. Yes.

Q. What did you say?

A. I think I asked the question, "what's going on?"

Q. What did McCarthy and Norton say?

A. I got an answer but I can't remember.

Q. Did you direct them to terminate the work stoppage?

A. Yes.

Q. You told them to terminate the work stoppage?

A. In part.

Q. You say——

A. I mean this; I might have said to them, "why don't you straighten this thing out?"

[fol. 228] Q. You said to them, "why don't you fellows try to straighten this thing out." Isn't that what you said?

A. It seems to me I did.

Q. You didn't say to them, "look fellows, stop this," did you?

A. No.

Q. You didn't say, "call off the work stoppage?"

A. No.

Q. You didn't say, "you fellows have got rocks in your head, you are taking a chance?"

A. No.

Q. Did you instruct any of the employees or any of the drivers, members of Local No. 25 to take the trailers out of the yard?

A. No.

Q. Did you call a meeting of the union members who were employed by the affected companies and ask them to return to work?

A. No.

Q. Did you ever voice any objection either in writing or

orally to the activity which was instituted by McCarthy and Norton at Yard #5?

A. No.

Q. I take it the reason you didn't was because they were acting within the scope of their power as business agents; it was their responsibility?

A. Right.

Q. Did McCarthy tell you at that time he wanted to stop part of the rail operation?

A. I can't recall that.

Q. Do you recall hearing McCarthy testify as follows:

"Q. So except for these special circumstances, you are also opposed to the bringing of trailers in from New York?

A. Opposed?

Q. Opposed to it, yes. You want to stop that?

A. We want to stop a part of the rail operation and get some of the work if we can, whether it's in from [fol. 229] New York or to Boston, that's true."

Do you recall hearing that?

A. Yes.

"Q. So you don't care where it comes from, but you want to stop part of it, is that the idea?

A. We want to stop part of the rail operation."

Do you recall that?

A. Yes.

Q. That in effect is the union's policy on that?

A. Yes.

Q. McCarthy and Norton I take it, had the power to express the union's policy and take whatever steps were necessary to implement it?

A. By virtue of their jobs.

Q. And the bylaws and constitution gives them those powers?

A. Yes.

Q. Incidentally, when Mr. McCarthy said he wanted to stop the operation of trailers that came in from New York, he was referring to trailers which were loaded at Harlem

River in New York and transported by flat cars to Boston, Yard #5; isn't that what he had in mind?

A. I don't know.

Q. You knew that trailers do come in from New York?

A. Yes.

Q. You do know that those trailers are brought to the New York yard of the New Haven Railroad by local New York City drivers?

A. By New York City drivers?

Q. Yes, to the yard at Harlem River?

A. That I don't know either.

Q. But you do know that it isn't a Local No. 25 man who brings it to the yard?

A. Yes.

Q. As a matter of fact you fellows have no jurisdiction over work coming out of New York, do you?

A. No.

[fol. 230] Q. That is work which is controlled by locals in New York?

A. Yes.

Q. Locals like #807?

A. Yes.

Q. And #707?

A. Yes.

Q. And #816?

A. I don't know too much about #816.

Q. #282?

A. No.

Q. But you do know #707 and #807 in New York have jurisdiction over the work?

A. Yes.

Q. So that actually you have no concern with trailers which come in from New York because you don't have that work anyhow?

A. Right.

Q. Can you tell us which business agent has jurisdiction over the M & M barn or area where the M & M barn is? I am speaking of July; I am not speaking of your period now. Would that have been Mr. Sullivan?

A. And Mr. Harrington.

Q. If there was a problem involving a contract violation

or grievance it would be Mr. Sullivan's and Mr. Harrington's or both their jobs to go to the M & M barn and try and iron the thing out?

A. Yes.

Q. No other agent would have the right to take over that business?

A. Yes.

Q. He would have a right?

A. Yes.

Q. When would that be?

A. When you couldn't get Sullivan or Harrington, not available.

Q. If Sullivan or Harrington were not available, and then as to that the members or even the employers might call any other business agent?

A. Yes.

[fol. 231] Q. But if they were available it is the business of the agent assigned to the barn to handle the business?

A. Yes.

Q. So that if Sullivan and Harrington were available and there was a grievance at the M & M, Sullivan and Harrington would handle the grievance?

A. Yes, sir.

Q. And McCarthy and Norton would have nothing to do with it?

A. Yes.

Q. However, if there was a problem which implicated the union, an overall union problem, then McCarthy and Norton might support Sullivan and Harrington?

A. Yes.

Q. Did you hear Mr. McCarthy testify that he had a conversation with Myer Marx of the M & M and that he and Norton were at the M & M terminal and thereafter Mr. Frank Thompson and Mr. Sullivan and Mr. Harrington came in? Do you recall that testimony?

A. It seems to me I do.

Q. Now, in such an instance the problem which was discussed would have been an overall union problem, because otherwise McCarthy and Norton wouldn't have shown up on the job, right?

A. Right.

Q. What I am getting at is that discussing the railroad's limitation of use of the flat car service they were implicated in a union adjustment?

A. Yes.

Q. They were speaking for the whole union, right?

A. No.

Q. Who were they speaking for?

A. McCarthy and Norton.

Q. You mean Sullivan and Harrington were speaking for McCarthy and Norton?

A. No.

Q. Wouldn't that have happened because Sullivan and Harrington, McCarthy and Norton appeared at the M & M barn to discuss this trailer-on-flat-car service and specific [fol. 232] limitation on its use, they were talking for the union, that was a union-wide problem, didn't just affect the M & M barn?

A. That's hard for me to answer.

Q. If there is a contract violation at a given barn, then the agents assigned to that barn would be the ones to take up the grievance?

A. Right.

Q. If there was an overall union problem, then all the agents would gather together to discuss that?

A. Yes.

Q. In this instance McCarthy and Norton went to the M & M barn and spoke to Meyer Marx to discuss limitation of the flat car service and they were supported by Sullivan and Harrington. They were supported by Sullivan and Harrington were they not, because the problem they wanted to discuss was an overall union problem and all four agents were speaking for the union?

A. I wouldn't say that.

Q. Well, did they?

A. I would say I was told they were there discussing many issues.

Q. Did you hear Mr. McCarthy say, appearing on Page 204 of the transcript:

> "A. We had a meeting with Mr. Marx, who is the owner or one of the owners of the M & M Transportation Company, at his office at 8 o'clock Monday, the

14th. Mr. Norton and I were present on the union side and Mr. Thompson was there for the employers group, Mr. Marx, and then later on Mr. Sullivan and Mr. Harrington came in.

Q. Did you make any attempt to bargain with Mr. Marx concerning the facts here in dispute, concerning the rail shipment of trailers?

A. Yes, I did then and I did prior to the dispute.

Q. Can you tell us what was Mr. Marx' response?

A. Well, Mr. Marx took a stand that at the time [fol. 233] nothing could be done as far as the rails were concerned. We went in there with the intention of seeing if we could get some of the trailers that were running over the rails."

A. I don't recall that; it is possible I couldn't have been in court.

Q. Couldn't have been in court on that day?

A. Yes.

Q. You were in court on that day; will you accept my word for that?

A. Yes.

Q. Will you look at this statement and see if it doesn't refresh your recollection that that is what McCarthy and Norton said?

A. I can't recall the evidence.

Q. At one occasion all four agents did meet with Meyer Marx at the time stated here? Did you learn about it, hear about it?

A. Yes, we heard about it.

Q. When all four agents got to Meyer Marx' place you had the whole union there except yourself and the other two officers, that is, the whole staff, these four business agents?

A. No, we had eleven.

Q. I am speaking of your elective officers. Your entire staff of business agents were McCarthy, Norton, Sullivan and Harrington?

A. Yes.

Q. The whole union was down Meyer Marx' to discuss this problem?

A. Yes, they were there. What they discussed I don't know.

Q. Mr. Jenkins, I know you have got a lot of duties and maybe this is not fair, but are you familiar with the trailer-on-flat-car service which the New Haven has?

A. Not too familiar; I have seen it.

Q. You have been down?

A. I have seen it, but I am not too familiar.

Q. Do you know approximately how many flat cars they have available?

A. No, I don't.

[fol. 234] Q. Did you ever have anybody check them for the union?

A. No.

Q. Have you any idea how many trailers can be loaded on a single flat car?

A. To the best of my knowledge I think about two.

Q. About two to a flat car. Are you familiar in a general way with the operation of a Boston carrier, for example, who has the flat car facilities, and how he handles it?

A. No, I don't think I have met that situation too much.

Q. But you do know this; you have been in the business for some time, that assuming we use M & M as an illustration only, a city driver, member of Local No. 25, will drive the tractor-trailer unit into Yard #5, where the tractor will be disengaged, and the trailer will then be loaded on the flat car. You do know about that?

A. Yes.

Q. That's the practice; and when it gets down to New York it is picked up by another driver of a tractor-trailer unit; you have that general understanding?

A. Yes.

Q. Let me ask you this. You are familiar with, however, the way in which motor carriers operate over the highway between Boston and New York?

A. Yes.

Q. So that when a load of freight is taken from Boston to New York over the road, over the highway, the practice is for the driver who brings the freight to New York, to pick up another load of freight to bring back to Boston or the environs of Boston?

A. Yes.

Q. Now, if a driver gets down to New York with a load of freight from Boston, and if there is no freight available at the time he gets there, then he lays over for a little while, does he?

A. Yes.

Q. And he is paid for the time he lays over?

A. Yes.

Q. Now, sometimes there is no freight available at all? That has been known to happen?

A. Yes.

[fol. 235] Q. And he dead-heads back?

A. Not that I recall.

Q. But there are instances where men will dead-head it back from New York?

A. I don't know.

Q. You know there are instances when a man has come back partially empty?

A. Yes.

Q. And the driver is paid for the trip back, isn't that so?

A. Yes.

Q. Now, when a trailer arrives at the railroad yard in New York, a city driver in New York picks up the trailer and brings it on to the consignor's terminal or consignee; you are generally familiar with that?

A. Yes.

Q. So that when a trailer gets down to New York there is no lay over of a driver, is there?

A. No.

Q. No lay over. No expense because there is no lay over?

A. Yes, there were from Boston to New York. A man comes in there, he goes to sleep.

Q. I am speaking of the rails. When the trailer comes on to the platform, it is not a Boston man that picks up the trailer at New York, but a New York City man?

A. Yes.

Q. The Boston man goes down to the rail head, he returns to the terminal; there is no lay over in New York?

A. Yes.

Q. So that the trailer-on-flat-car allocation over in New York did occur from time to time?

A. Yes.

Q. When a trailer gets down to New York, having been sent there from Boston on a flat car, it will come back on a flat car? Isn't that the usual practice to the best of your knowledge?

A. To the best of my knowledge.

[fol. 236] Q. Now, I take it that one of the things with which the union was concerned was that the drivers be employed, that's the principal one, the welfare of the membership. You do recall I take it, you testified that the number of the members of the union have increased since 1938?

A. Yes.

Q. And that the number of the drivers employed by the motor carriers in the Boston area has also increased since 1938?

A. Yes.

Q. So that the increase in the number of drivers who are members of the union who have been employed, it has been increased at the same time that the trailer-on-flat-car service was growing? Both things were happening at the same time?

A. Yes.

Q. And you were concerned about this; if there was no limitation on the use of trailer-on-flat-cars, the carriers would send more trailers over the flat cars than they do now? That's one of the problems?

A. Yes.

Q. So that if there was no restriction then the likelihood is that the carriers would try to use all of the flat cars they possibly could use within their power? Isn't that the problem you are facing now?

A. Well, it's hard to answer what the employers would or wouldn't do.

Q. Isn't that the problem the union is concerned with, if there was no limitation they would be using the flat cars more than they do?

A. Yes.

Q. Now, did Local No. 25 ever restrict a carrier from interlining freight with another motor carrier?

A. Not to my knowledge.

Q. Did Local No. 25 ever limit the right of a carrier to transfer freight?

A. Not to my knowledge.

Q. Will you explain to the Court what is an interlining arrangement?

A. An interline arrangement could be M & M Transportation, or M & R.

[fol. 237] Q. Let's take a concrete illustration. Suppose St. Johnsbury comes out of Vermont with a tractor-trailer unit and goes into Boston and there the interline is Stone's Express; they would unhook the trailer and put it on to a horse owned by Stone's Express, and Stone's Express driver would bring it into New York?

A. That's right,

Q. That would be a typical interline arrangement?

A. Yes.

Q. So that the driver who starts out from Vermont would terminate his run at Boston, he would be through, and the stuff would go on by M & M?

A. Right.

Q. Let's take,—change Stone's Express. Let's take another example. Suppose there is an interline arrangement with suppose, Adley's Express, correct?

A. Yes.

Q. Who have offices in New Haven?

A. Yes.

Q. Has a terminal there. Let's take John Welch, who operated between New York, between Boston and New York and who interlines with Adley's Express it would be the procedure, John Welch would have his man drive from Boston to New Haven where the trailer would be switched on to a tractor owned by Adley and the Adley tractor unit would bring it into New York?

A. That would be the procedure.

Q. When the transaction occurs, Local No 25 man is not running the equipment over the road there, or from New Haven over to New York?

A. No.

Q. Now, when the motor carrier takes it from the terminal in Boston and brings it to the rail head and puts it on a flat car, your man is not operating the flat car?

A. That's right.

Q. So that in effect you have something like an interline arrangement, isn't it, between the railroad and the local carriers? It's like an interline arrangement?

A. I can't agree.

Q. Let's go over it again. If a trailer is brought from Boston to New Haven where it is disengaged from the [fol. 238] tractor and hooked on to an Adley Express tractor, Local No. 25 man's run ends at New Haven and he is finished at New Haven?

A. Right.

Q. He has to go back to New York or to Boston while the trailer continues on to New York with a man belonging to another local union, right?

A. Right.

Q. An Adley Express man. So that Local No. 25 man does not get the motor job from New Haven to New York, isn't that so?

A. That's right.

Q. Thus far you have never prohibited that? You have no objection to that?

A. That's right.

Q. Now I ask you, when a motor carrier uses the flat cars, he takes a trailer from the terminal in Boston, brings it to the rail head at Yard #5 and the trailer is disengaged and put on a flat car; the Local No. 25 man does not drive the flat car into New York, does he?

A. Right.

Q. So that he gets the operation from the terminal to the rail head?

A. Yes.

Q. Just like the Welch man gets the operation from Boston to New Haven?

A. Yes.

Q. So that when the trailer is disengaged, what you have really is an interline arrangement, isn't that so?

A. Yes.

Q. So that the only difference between an interline arrangement of John Welch and the Adley Express, and John Welch and the railroad, is that the trailer in the first instance is driven by a motor power unit from New Haven to New York, and in the second case it is trans-

ported on a flat car? Isn't that a fact, that that is the only difference?

A. Yes.

Q. You never prohibit that interlining?

A. No.

[fol. 239] Q. There is no question that John Welch's man could drive that entire unit all the way from Boston to New York? He knows how to drive?

A. Yes.

Q. So that when there is an interline with Adley's Express, to which you have no objection, your man really loses a trip from Boston all the way to New York?

A. Yes.

Q. But you have no objection to that?

A. No.

Q. But you have an objection if it goes by rail?

A. Yes.

Mr. Burstein: Your Honor, at the conclusion of the last hearing—I have no further questions of this witness with the exception of this telegram. I wish to introduce the telegram. Will counsel stipulate that the original of this telegram was sent to the Union?

Q. Mr. Jenkins, do you recall receiving a telegram from the Railroad on or about July 21?

(Telegram from Railroad to Union marked A for Identification.)

Q. I show you Petitioner's Exhibit A for Identification and ask you if you recall receiving the original on or about July 21, I know you can't be exact about the date.

A. Yes.

Mr. Burstein: I respectfully offer this in evidence.

(Exhibit #10—Telegram from Railroad to Union)

Q. Now, after receiving this telegram did you communicate with Mr. Sundel?

A. I believe I talked with the gentleman.

Q. Do you remember what you said to him?

A. I don't know; I can't recall.

Q. Did you arrange to meet with him?

A. I can't recall that either.

[fol. 240] Q. It is a fact, is it not, that you told him that there was no point in meeting since you had no dispute with the railroad?

A. That's right.

Q. You didn't call a meeting of the membership to advise them of this telegram?

A. No.

Q. So that you did nothing about the telegram other than call Mr. Sundel and say there was no point in meeting?

A. Right.

Q. I have no further questions.

Cross-examination.

By Mr. D'Arcy:

Q. Mr. Jenkins, as to the language in Article VII and all the proposals and all the agreements which have been consummated between the Union and the motor carriers, how did the language in the ultimate agreements come about?

Mr. Burstein: I object, of course, to that.

The Court: He may have had some discussion with somebody that was finally reduced to writing.

Mr. D'Arcy: Not reduced to writing but as to back ground, as to the exact language which came out in the ultimate contracts, which are in evidence already, as to how that language came about.

The Court: I suppose the contract will speak for itself.

Mr. D'Arcy: That's one of the questions. Apparently it has become quite involved, since there is some dispute as to what it means. I would like to let the Court know how the language came into being.

The Court: I don't care.

Mr. Burstein: We submit that language in the contract speaks for itself.

[fol. 241] The Court: I agree with you, but I am going to let him ask him just the same.

Q. Now Mr. Jenkins, can you tell us how the ultimate language in the agreement came to pass?

A. As a result of the competitive competition, whether it be rail, sea or air.

Q. As to the specific terms or language, Mr. Jenkins, and I am not talking about any other problem, but the contract between the various motor carriers and the Union, who put the language in the agreement?

A. The motor carriers. Let me understand you.

Q. I would like you to explain how the particular clause in the contract came into their specific wording?

Mr. Burstein: I don't want to interrupt my brother.

The Court: I still agree with your conclusion. Save any rights if you like.

Mr. Burstein: May I have a continuing objection so I won't be jumping up and disturbing him?

The Court: Certainly.

Mr. Burstein: And Your Honor will note our exception.

The Court: Of course the writing speaks for itself.

Mr. Burstein: Of course I will be obliged to move after his testimony that it be all stricken.

The Court: Why don't you, before we finish the case?

Mr. Burstein: All right.

Mr. D'Arcy: We don't have an answer to the last question. In view of the Railroad's statement, there is no need of going any further.

[fol. 242] The Court: As you very well know, it wouldn't make any difference how much talk took place before, when a contract is signed. That's period.

Mr. D'Arcy: That's perfectly agreeable to me.

The Court: I think so.

Q. As a result of Article VII in the existing agreement, have there been grievances brought up by the Union?

A. Yes.

Q. Have those grievances been processed under Article VIII of the Agreement?

A. Yes.

Q. Have they been processed in some instances to the ultimate of arbitration?

A. Right.

Q. Have any of those grievances concerned the assignment of the available work when there was equipment at a certain barn?

Mr. Burstein: Objection.

A. Yes.

The Court: I will admit it.

Q. Some of these grievances and ultimate arbitration, Mr. Jenkins, that have concerned the assignment of available jobs to your various members, is that correct?

A. Yes.

Mr. Burstein: I object.

The Court: Are you trying to explain something that was brought out in the other examination? Are you trying to clarify any of his statements on direct?

Mr. D'Arcy: No, because there has been no testimony about arbitration.

[fol. 243] Q. You have testified that it has been the Union's position that the Union, as such, would like to secure all the work of driving the particular equipment of the various employers?

A. Yes.

Q. Has the Union made any demands to that effect?

A. Yes.

Q. Other than through the negotiations of proposals which you have testified to?

A. No.

Q. After the proposals or other conversations had taken place, the Union did nothing further?

A. Right.

Mr. Burstein: I must object to the form of the question if nothing else. The witness should be permitted to testify.

The Court: I think so.

Q. I will direct your attention, Mr. Jenkins, to the activities which occurred in July last year, about which you have testified at the previous hearing and here this morning. Other than those particular activities and prior negotiations, has the Union done anything to enforce the demand concerning this assignment of work?

A. No.

The Court: Why don't I strike out the evidence now about those conversations that eventually resulted in a written agreement or contract, so we won't forget it?

Mr. D'Arcy: It is agreeable with me.

The Court: All right; we will stop until 2 o'clock.

(Noon recess)

2 P.M.

(Conference at the bench not reported)

Mr. D'Arcy: As I told Your Honor, in view of the fact that most of Mr. Jenkins' testimony on cross-examination [fol. 244] is contained in the prior transcript, I only wish to clear up a very few points on which he testified this morning.

Q. One of those, Mr. Jenkins, relates to the arrangement or assignment of the various business agents. I think your testimony was, and I know your testimony was that these agents Norton and McCarthy, were assigned to the area in which Yard #5 of the railroad is located?

A. Yes.

Q. You meant by that it was the area to which they were assigned?

A. Yes.

Q. Rather than to any given employer or barn or anything?

A. That's right.

Q. As to events which occured last July, on July 11, 12 and 14, in your testimony this morning that was classified as a work stoppage. Do you of your own knowledge know of any work stoppage that took place?

Mr. Burstein: I object, because we say now he is asking him to characterize his testimony. The testimony has already been in as to what the defendant said as to work stoppage.

The Court: I thought he said this morning there was a work stoppage throught McCarthy and Norton or one.

Mr. Burstein: That's right.

The Court: You want to ask him to clarify what he said this morning?

Mr. D'Arcy: I don't think he ever used the words 'work stoppage.' I know he didn't.

The Court: I will let you clear it up if you can.

Mr. D'Arcy: That's exactly what I would like to do.

[fol. 245] Q. Do you know, Mr. Jenkins, do you know of any work stoppage which existed?

A. No.

Q. Do you know exactly what activities did transpire on those dates?

A. Other than the trucks went on to the railroad and they went back home.

Q. Did you participate in those activities?

A. No.

Q. Did you see any of the activities being participated in by the other agents?

A. No.

Q. You also testified, Mr. Jenkins, that you didn't direct any of the employees to return to work?

A. No.

Q. Do you know that any employees did not continue working all during this period in dispute?

A. No.

Q. As to your testimony concerning an alleged interlinement, Mr. Burstein gave you a supposition as to a possible interlinement between Welch Company and the Adley Company. Do you know that any such interlinement exists?

A. No, we don't have it.

Q. Do you know of any such interlinement existing between any two motor carriers between Boston and New York?

A. Not to the best of my knowledge; no, I am not positively sure.

Q. To your knowledge there was no such interlinement between New York and Boston does exist?

A. Right.

Q. No further questions.

Redirect examination.

By Mr. Burstein:

Q. You said that you know of no interline arrangement in which Boston carriers participate?

A. Boston and New York.

[fol. 246] Q. Did you know of an interline arrangement between M & M and M & R Transportation at Springfield?

A. No, I did not.

Q. You don't want to say that they didn't?

A. No, I don't.

Q. You are not familiar with the operation of all the carriers, are you?

A. No, I am not.

Q. Which carriers do you refer to when you say that there is no interline arrangement? Will you name them?

A. I say no carriers going between Boston and New York.

Q. Do you know for a fact that every carrier who operates between Boston and New York doesn't participate in an interline arrangement?

A. No.

Q. You don't know that for a fact. As a matter of fact you don't know every carrier who operates between Boston and New York?

A. I refer particularly to the Boston and New York operation. I know about every carrier.

Q. You know about every carrier. Can you name all the carriers and their authority, which carriers have authority to operate between Boston and New York?

A. There's several; there's a lot of them.

Q. You don't know the nature of the operations? Some of them you know and some you don't know?

A. Let's say Boston and New York operation I know.

Q. How about the M & M Express to Springfield with M & R? Do you know about that?

A. No.

Q. M & M operates between Boston and New York?

A. Yes.

Q. How about this St. Johnsbury? Do they operate between Boston and New York?

A. Yes.

Q. Isn't it a fact until recently St. Johnsbury operated from Vermont to Boston or to Springfield and interlined [fol. 247] at that point for operation to New York with

Plymouth Rock Transportation and M & M Transportation?

A. Not that I know of.

Q. But you don't know that they did not interline?

A. That's right.

Q. You are not familiar with the nature of the St. Johnsbury operation?

A. More or less.

Q. But you are not familiar with the fact that until they instituted an operation known as the Hinch run, they did not operate directly from Vermont and Maine direct to New York?

A. Correct.

Q. But they used an interline arrangement at Boston and Springfield? You know of that, don't you?

A. No.

Q. Isn't it a fact that you knew that the Union on July 11 to 14 interfered only with the carriers with whom Local No. 25 had a contract?

A. Yes.

Q. You knew that?

A. Yes.

Mr. Burstein: Your Honor, at this point I would like to call your attention to a statement by counsel for the Union, which appears on Pages 112 and 113 of the transcript, which reads as follows:

The Court: May I have the exhibit please?

Mr. Burstein: Yes, Exhibit #8. I might say the remark was in response to a suggestion that certain matters be stipulated.

> "I might answer my brother, your Honor. As a matter of fact, the union is perfectly willing to agree that we have no dispute nor do we have any intention of attempting to interfere with any vehicles coming in from outside Boston nor do we intend to interfere with any vehicles being delivered to Yard 5 of the railroad which do not belong to employers with whom we have collective bargaining agreements."

[fol. 248] Q. Do you remember Mr. D'Arcy making that statement?

The Court: May I have the page, please?

Mr. Burstein: Pages 112 to 113.

Q. Do you recall Mr. McCarthy testifying as follows, and that, Your Honor is at page 207, Exhibit #8.

"Q. So that you did not stop anybody with whom you do not have a contract providing for hire and tenure of employment?

A. That's right.

Q. Why did you not attempt to stop or interfere with those particular trailers?

A. That we let go through?

Q. Yes.

Q. Well, we had no contracts with some of them. The others didn't have a rail operation. We had no dispute with them."

Do you recall he testified to that?

A. No, I don't.

Q. Do you recall Mr. McCarthy testified that he stopped trailers which were being operated by carriers with whom Local No. 25 has a contract?

A. I don't recall. I didn't hear all of Mr. McCarthy's testimony.

Q. Suppose I show you the testiimony and ask you if that refreshes your recollection? Do you recall Mr. McCarthy testified as shown on Page 216, Exhibit #8:

"Q. So when you testified that you permitted certain trailers to enter Yard 5, you meant that you did not permit other trailers to enter Yard 5, is that correct?

A. Some trailers we wouldn't permit to come in, that's right.

[fol. 249] Q. And when you said you did not interfere with or interrupt certain of the trailers, you meant by that that you did not interfere with other trailers?

A. We talked to them and told them to go back."

Do you recall that was his testimony?

A. No.

Q. When you got back down to Yard 5, isn't it a fact that you spoke with Norton and McCarthy and asked them what it was all about? Did you testify to that?

A. It seems to me I said something like that.

Q. Didn't they tell you they were stopping the trailers of some of the carriers with whom you had contracts?

A. I don't recall what they told me.

Q. What do you recall that they did tell you?

A. I recall of having a conversation with regard to the number of people hanging around.

Q. What did you say?

A. I said, "what's the story?"

Q. What did they say?

A. Somebody said, "well, there's no story, we are just sending some trucks back."

Q. That's what they said, "we are just sending some trucks back." Did you ask any further questions?

A. No.

Q. I have no further questions.

Mr. D'Arcy: No further questions.

JOHN H. WELCH, Sworn.

Direct examination.

By Mr. Burstein:

Q. Will you state your full name and home address?

A. John H. Welch, 77 Columbia Road, Arlington.

[fol. 250] Q. With what Company?

A. H. P. Welch Company.

Q. In what capacity?

A. Vice-president.

Q. How long have you held that office?

A. Twenty years or more.

Q. Will you very briefly describe the business of H. P. Welch and Company?

A. Motor car carriers hauling freight from, between points in New England and points in New Jersey and New York.

Q. Does the Company have a certificate of public convenience and necessity from the Interstate Commerce Commission?

A. Yes, sir.

Q. Does the Company operate its own tractors and trailers and other trucking equipment over the highway between Boston and New York?

A. Yes.

Q. Does the Company also use the service of the railroads, their trailer-on-flat-car service, which I shall briefly refer to as the TOFC?

A. Yes.

Q. Do you hold any office in the Association of Employers, who represent the motor industry in the collective bargaining with Local No. 25?

A. Yes.

Q. What office is that?

A. President.

Q. How long have you held that office?

A. The past sixteen years.

Q. I take it you acted as the President of the Employers Committee in the year 1946?

A. Chairman.

Q. You participated in the collective bargaining negotiations?

A. Yes.

Q. It is true is it not, prior to the commencement of negotiations you and your Committee received from the Union [fol. 251] a series of proposals for a new collective bargaining agreement to operate during the period 1946 to 1947?

A. Yes.

Q. Did you hear the testimony by Mr. Jenkins with respect to the inclusion in these proposals of Article VII, which provided as follows:

> "It is agreed that employers will not engage other equipment while they have available equipment of their own. When necessary to hire equipment, it is agreed that in order to assist in giving employment to members of Local 25 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America and/or to reduce the idle equipment burden of those employers signatory hereto, that such employers shall hire said equipment as follows: from employers likewise signatory to this agreement when such

employers are able to furnish said equipment. Movement by rail 'flat car' cannot be used while employers have available equipment of their own."

Do you recall that proposal?

A. Yes.

Q. I show you—may I say to the best of my recollection this was offered in evidence at the previous hearing. It is a somewhat battered copy but it is the copy in evidence, and I think it is Exhibit #3. Mr. Welch, I show you,—I think the copy of the proposal I have seems a better copy; I don't think it is an exhibit in evidence, but I would like to use it for the purpose of developing evidence here; we will have to go along this way. I call your attention to Exhibit #3, and I call your particular attention to the portion reading at the very end, "Movement by rail 'flat car,'" the last sentence, and I ask you whether in your experience of over sixteen years, and based on your experience in the industry prior to the time you became Chairman, there was ever included in a contract with Local No. 25, a clause of that or similar kind?

A. No.

Q. Can you state whether or not the clause shown in that last sentence in Article VII, represented the first demand by the railroad,— by the Union for the elimination of trailer-on-flat-car service?

A. As near as I remember.

[fol. 252] Q. Can you state whether or not the preceding sentence in Article VII, namely, that which deals with leased equipment, existed in collective bargaining agreements with Local No. 25 before 1946?

A. I am not sure that they did or did not; I don't remember what year.

Q. 1946 is the year in which the first contract containing this clause was submitted to the employers, and I believe you testified to that effect.

A. Submitted the last clause, movement by rail?

Q. Yes; that was the first year the last clause was submitted. I spoke of the preceding sentence which deals with leased equipment. I call your attention to the first few sentences about the use of leased equipment. Now I ask you whether or not that clause, the limitation of the use of leased

equipment appeared in the collective bargaining agreements with Local No. 25 prior to the date when the proposal was submitted to the employers?

A. You mean a prior, the previous articles?

Q. Yes.

A. They were in there.

Q. The paragraph other than the one relating to movement by rail, the one which related to leased equipment alone, did appear in the collective bargaining agreements prior to 1946?

A. Yes.

Q. To the best of your knowledge for how many years approximately prior to 1946 was there a clause in the agreement relating to and applicable to leased equipment?

A. It might go back to 1940.

Q. 1940?

A. 1939 possibly.

Q. Now, is it your best recollection that the present agreement, now in evidence, contains a clause which deals with leased equipment?

A. It does.

Q. Is there any clause,—I show you Exhibit #7 and ask you whether or not Article VII or any other clause in this agreement, to the best of your knowledge treats of or is intended to provide for the elimination or restriction of the use of flat cars?

A. No.

[fol. 253] Q. Do you recall, Mr. Welch, that in 1949 the employers submitted,—the Union submitted to the employers a series of proposals in advance of negotiations of the collective bargaining agreement?

A. Yes.

Q. I call your attention to Petitioner's Exhibit #4, Article VII thereof, and I ask you whether or not the following language has appeared in any collective bargaining agreement negotiated with Local No. 25, as follows: "Movement by rail, 'flat car' or ships, cannot be used while employers have available equipment of their own or employees on the seniority list are not working." Did that clause ever appear in a collective bargaining agreement?

A. Not with the negotiated agreement.

Q. After the submission of the proposals, the employers and the Union negotiated and signed a collective bargaining agreement, did they not?

A. Yes.

Q. Now, I show you Petitioner's Exhibit #6, which is headed, "1949 Agreement", and I call your attention to Article VII and ask you whether or not there is contained any prohibition against the use of flat cars or any limitation of the use thereof?

A. There isn't.

Q. Is it your testimony that in the negotiation of the final agreement the clause which I just read to you, namely, that which relates to the use of flat cars, was eliminated?

A. It was.

Q. There is presently in effect, is there not, a collective bargaining agreement between Local No. 25 and the employers, which expires on or about April 11, 1953?

A. Yes, sir.

Q. And this agreement, I show you Petitioner's Exhibit #7, which is a copy of the presently existing agreement, and ask you whether this agreement, Exhibit #7, was in full force and effect during the period July 11 to July 14, 1952?

A. Yes.

Q. I call your attention to Article VII, and ask you whether or not there is contained therein any limitation of the use of or prohibition against the use of flat cars?

A. There isn't.

[fol. 254] Q. I ask you this, Mr. Welch. Look at Article VII, and will you tell the Court whether or not the language relating to the use of leased equipment has appeared in collective bargaining agreements between Local No. 25 and the employers for a period prior to and since 1946?

A. Yes.

Q. Mr. Welch, you are appearing here pursuant to a subpoena which our office served upon you?

A. That's right.

Q. I have no further questions.

Cross-examination.

By Mr. D'Arcy:

Q. Mr. Welch, have you sat as a member of the Grievance Committee under Article VIII of this agreement?

A. I have.

Q. And that Grievance Committee is the one which consists of the so-called Joint Committee, composed of both employees, members of the Union and business agents, and members of the Employers Group of Motor Freight Carriers?

A. That's right.

Q. That joint committee is designed to iron out any grievances or disputes which come up concerning the interpretation of clauses within the contract?

A. It is to determine and vote on disputes in cases that are brought before it.

Q. And you have sat on that group several times, is that true?

A. Yes.

Q. As a voting member?

A. Yes.

Q. Have any cases come up concerning interpretation of Article VII of the agreement?

A. There may have been.

Q. You don't recall?

A. What part of the article are you speaking on?

[fol. 255] Q. Well, whether the article as my colleague has brought out, as drawn, it has only got to do with leased equipment, and that it has no prohibition in it as such against the use of flat cars so-called?

A. Say that again.

Q. That this article in and of itself has no specific prohibition against the use of the trailer-on-flat-car service?

A. It hasn't.

Q. Except, is it possible that herein there is a question of leasing equipment?

A. It has nothing to do with the leasing of equipment and was never intended to have anything to do with it, to my knowledge.

Q. Can you tell us what it had intended to do with?

A. Specifically what it says, that if there was additional equipment around and it could be had, by carriers that had a surplus of motor equipment, it would be, an attempt would be made to get it, and it would be used by the carrier needing it.

Q. Does it also mean, Mr. Welch, that where you have available equipment, or let's say the H. P. Welch Company, you may not use other equipment to haul those particular trailers?

A. What other kind of equipment?

Q. I don't know. Any kind of equipment that might be used in the transportation?

A. Treating with motor equipment.

Q. Have there been any cases——

The Court: Have you finished your answer?

The Witness: Treating with motor equipment. That is the only equipment that this article is pertinent to.

Q. Have there been cases coming before the joint committee, which had been resolved to come to the joint committee, involving an employee who has been held in so-called and not sent out on a trip or not, even though there may have been equipment available for that run?

A. I don't remember of any right now.

[fol. 256] Q. Do you recall whether or not, Mr. Welch, you ever sat on a joint committee meeting or joint meeting, regarding an alleged violation of the St. Johnsbury agreement, in May of last year?

A. I did sit on one meeting that had to do with the St. Johnsbury Trucking Company.

Q. May I direct your attention to the dates of May 22 and May 29?

A. I don't remember what dates.

Q. But do you recall that there was one or there were two meetings upon which you sat, different cases?

A. There was one meeting that I remember of before the joint committee, three from the Union and three from the employers' side.

Q. Do you recall having participated in another meeting the following week with the so-called seventh man, the arbitrator?

A. I do.

Q. Also on St. Johnsbury?

A. I do.

Q. Did the facts in dispute at those particular meetings involve violation of this leased equipment clause?

Mr. Burstein: I object.

The Court: Yes or No.

A. I don't believe so.

Q. Do you recall that there were three employees involved on these two particular dates, Mr. Welch, by the names of Nunziato, Taylor and Ure?

A. I remember more than three.

Q. On those two days—I think we have the joint committee action, those were the only three?

A. I don't remember their names.

Q. But you remember that certain employees——

A. It seems to me it was four rather than three; I may be wrong.

Q. Well, do you recall, Mr. Welch, that those employees were awarded pay for given days?

A. No.

[fol. 257] Q. As a result of the meeting?

A. No.

Mr. Burstein: Objection.

The Court: It's too late, but the answer doesn't hurt anybody.

Mr. Burstein: I don't believe so.

The Court: He said No.

Q. You don't recall?

A. No. The answer is No.

Mr. D'Arcy: I would like to offer these two exhibits for identification.

(Exhibit 'B' for Identification—Copy of Joint Committee's report, May 22, 1952.)

(Exhibit 'C' for Identification—Copy of Joint Committee's report, May 29, 1952.)

Mr. D'Arcy: May I offer these in evidence?

Mr. Burstein: No.

Mr. D'Arcy: Then I will show them to the witness one at a time.

Mr. Burstein: For what purpose are they being shown?

The Court: He is going to ask him to refresh his recollection, that's all.

Mr. D'Arcy: That was the entire purpose.

Q. Is your recollection refreshed, Mr. Welch, as to whether or not any of the employees were awarded pay?

A. Not under Article VII.

Q. I didn't ask you that. As to whether or not they were awarded pay?

[fol. 258] The Court: He may answer it Yes or No.

A. They were awarded pay.

Q. Do you recall under what circumstances they were awarded pay?

A. Yes, seniority.

Q. Can you explain that a little more specifically?

Mr. Burstein: I object.

The Court: Do you mean what seniority is?

Mr. D'Arcy: As to why they were all awarded their pay.

The Court: What is the purpose?

Mr. D'Arcy: It is my understanding that there have been several cases brought up before this joint committee on arbitration involving employees who were kept in and not given their day's work while there was equipment available, certain trailers having been shipped on the rails, and I am trying to bring out through this witness whether he knew anything of this suggested situation.

The Court: Do you think it has anything to do with the issue?

Mr. D'Arcy: If anything that has gone on before has anything to do with the issue, I believe it has.

The Court: All right.

Mr. Burstein: For the record only, I move to strike counsel's comments.

The Court: Yes, they may go out.

Mr. Burstein: And I now object on the ground that any transaction had between Mr. Welch as a representative of this Committee, and a third party, not in the presence of the Petitioner Railroad is not binding upon the Petitioner Railroad.

[fol. 259] The Court: Your reasoning is very good, but I will admit it just the same.

Q. As to why they were awarded money because of some seniority?

A. They were worked out in seniority order.

Q. With no involvement of any leased or other equipment?

A. No.

Q. To your recollection?

A. No.

Q. You have testified, Mr. Welch, that your Company is a user of this trailer-on-flat-car service?

A. Yes.

Q. Do you use any other service in transporting vehicles in and around New England or between Boston and New York other than either by motor haulage, the so-called tractor plus trailer, or the flat car service?

A. Those are the only two.

Q. To your knowledge are they the only two that exist at this time?

A. So far as I know.

Q. Was there at some time another type of so-called substitute service which was in existence?

A. Not that I know of.

Q. Do you recall that there was at one time an Eastern Steamship Line working in and around Boston?

A. I do.

Q. Do you recall that the Eastern Steamship used to haul trailers from Boston to New York York over water?

A. No.

Q. You don't recall?

A. No, because they didn't.

Q. Do you recall any other shipping company hauling trailers from Boston to New York?

A. I recall of none.

Q. You know of none, is that correct?

A. Correct.

[fol. 260] Q. If you in the conduct of your business, Mr. Welch, were not to use the trailer-on-flat car service, how would you transport these particular trailers?

Mr. Burstein: I object.

The Court: He may answer.

A. I would either handle them by one way or the other, either by trailer by tractor, or by the trailer on the flat car; those are the only two I know of, using semi-trailers.

Q. If you operated with a trailer and tractor, who would drive the tractor?

A. The driver, a member, a union member?

Q. Yes, your Company?

A. A member of Local No. 25 under our contract.

Q. So that if you did not use the railroad trailer-on-flat-car service, the vehicles would be transported by a member of Local No. 25?

A. Those are the only two as far as I know.

Q. Then you would so transport them by members of Local No. 25?

A. Either one way or the other from Boston.

Q. From Boston to New York. And while I am on that particular point, is there any sort of interchange between Boston and New York State line? In other words, when your trailer leaves Boston outbound, does it stop so far as you know, before it leaves the Commonwealth of Massachusetts?

A. Well, it might.

Q. In your consignments or in your shipments of these particular trailers, do you ship them to any stop closer than New Haven by flat car?

A. By flat car?

Q. Yes.

A. No.

Q. So that every trailer which you ship by flat car travels in interstate commerce?

A. Yes.

[fol. 261] Q. None of them travel in intra-state commerce from the,—within the confines of Massachusetts?

A. No.

Redirect examination.

By Mr. Burstein:

Q. Mr. Welch, when your Company uses the flat car, it is a fact is it not, that a member of Local No. 25 drives

the tractor-trailer unit from your terminal or wherever the terminal happens to be, to the yard?

A. Yes.

Q. Do you know of any truck drivers in your employ who can drive a train?

A. No, I don't.

Q. You were telling Mr. D'Arcy about the lease operation, and I believe you testified Article VII relates to leased motor equipment, is that correct?

A. Yes, that's right.

Q. Is there such a phenomena, an institution in the industry known as the gypsy operator?

A. There is.

Q. Will you tell the Court what a gipsy operator is in the motor business?

A. A gipsy operator is usually one who owns one, two or three, some call them trucks or trailers, or owns a tractor that would pull a trailer from here to there, whether it be between Boston and New York or here to here in Boston.

Q. A gipsy operator is a man who owns either a tractor-trailer unit or a tractor alone, but doesn't have authority from the Interstate Commerce Commission to engage in interstate motor transportation. Isn't that a fairly good definition?

A. Yes.

Q. Is it true that in the past, and perhaps today, there is a practice whereby a motor carrier may hire a gypsy operator or a so-called lay-in operator, either to transport freight or to hook on to the motor carrier's trailer and transport it over the road to destination point?

A. Yes.

Q. So that when this clause was written in, was there a gipsy operator problem?

A. Yes.

[fol. 262] Q. Isn't it a fact that that last clause in Article VII was intended to eliminate and restrict the use of gipsy operators, their motor vehicle equipment, so long as you had available equipment?

A. Yes.

Q. Wasn't that the purpose?

A. Yes.

Q. Wasn't the gipsy operation a problem? Didn't that occur at the same time that trailer-on-flat-car service was being performed? Both were being done at the same time?

A. Yes.

Q. 1938, to the best of your knowledge, there was a trailer-on-flat-car service?

A. Yes.

Q. In 1938, to the best of your recollection, the Interstate Commerce Commission regulated interstate motor carriers?

A. Yes.

Q. In 1938 there were gipsy-owned operators who had no license authorizing him to operate by the Interstate Commerce Commission?

A. Yes.

Q. And in 1938 and until the present time a gipsy-owned operator would lease his equipment to a bona fide interstate motor carrier and transport the motor carrier's freight under a lease arrangement?

A. Yes.

Q. So that in some instances the motor carrier might have idle equipment around, but he would use a gipsy operator to transport the freight?

A. Yes.

Q. And because of the latter situation the Union insisted that there be no use of gipsy operators when motor carriers had motor vehicle equipment available?

A. Yes.

Q. Wasn't that why Article VII was written into the contract?

A. That was the prime reason.

[fol. 263] Recross-examination.

By Mr. D'Arcy:

Q. It has been your testimony that as far as you know, and you participated in the negotiations working towards Article VII, it concerned fully leased equipment and so-called motor equipment as you put it, alone?

A. Yes.

Q. Did you participate in a meeting with business agents

of this Union in last June, late June or early July 1952, at the Hotel Somerset?

A. I attended several meetings during the summer; I don't remember just when the dates were.

Q. Do you recall a specific meeting at which the Union, either in late June or early July, requested the Negotiating Committee of the Employers group, to meet with them?

A. Yes.

Q. Do you recall what purpose that meeting was called for? It was called I believe, by the Union.

A. It might have been called for,—to discuss several items of business.

Q. It might have been? That's true?

A. It probably was.

Q. I am trying to direct your attention to the particular meeting that lasted about fifteen or twenty minutes, a very short meeting. Do you recall any such?

A. I recall some meetings, but I don't know which one, exactly which one you have reference to.

Q. This meeting was called by the Union agents and they appeared and met with yourself and some of the other members of the Negotiating Committee, and the Union proposed or requested that the Committee sit down and clarify with them Article VII, and I mean Article VII, with reference to the so-called trailer-on-flat-car service?

A. No.

Mr. Burstein: I object.

The Court: The answer is No.

Q. Do you recall any meeting requested by the Union, Mr. Welch, at which they proposed to discuss with your Negotiating Committee, questions pertaining to the trailer-
[fol. 264] on-flat-car service?

A. It might have been discussed at some one of those meetings, of which there was probably more than one during the summer of 1952.

Q. Then what is your recollection? I am trying to confine this particular examination to a period prior to July 11.

A. I don't remember when it was.

Q. Do you recall it took place prior to what has been termed the stoppage?

A. No, I don't remember.

Q. You don't recall that there was any such meeting?

A. I don't remember when the meeting was, whether it was before or after the date you speak about. I don't remember the date.

Q. Then Mr. Welch, is it your recollection that there was no meeting held prior to this so-called stoppage in which the Union attempted to discuss the trailer-on-flat-car operation with your Committee?

A. Going back to my original answer, there may have been several items that the meeting was called for, among which might have been something to do with the trailer-on-flat-car.

Q. I would like to have you refresh your recollection and try and remember whether or not specifically the trailer-on-flat-car operation was discussed or attempted to be discussed by the members of the Union?

A. It might have been; I don't remember whether it was or not. It might have been.

Q. You can't testify one way or another. Can you recall, if you take a solemn minute, as to whether or not the Union did propose to discuss this matter with your Committee?

A. Well, I believe that they did.

Q. You believe that they did?

A. Discuss something about the trailer-on-flat-car.

Q. You recall what the Committee, at least the Employers' representatives on the Committee advised them?

[fol. 265] Mr. Burstein: I must object.

The Court: I don't see how it makes any difference at all.

Q. All right, I will withdraw the question. No further questions.

Mr. Burstein: I have no further questions.

(P.M. recess)

LEONARD E. ROSENBERG, sworn.

Direct examination.

By Mr. Burstein:

Q. Will you please state your full name and home address?

A. Leonard E. Rosenberg, 207 Court Road, Winthrop, Mass.

Q. With what company are you associated?

A. Holland Transportation Company.

Q. In what capacity?

A. Manager.

Q. How long have you held the position of manager?

A. For a period of about fifteen years, except for the time I was in the Service.

Q. Will you describe very briefly the nature of the business of the Holland Transportation Company?

A. Holland Transportation Company is engaged in the transportation of general commodities between points in Massachusetts, Rhode Island, Connecticut, New York, New Jersey and Pennsylvania.

Q. Does Holland Transportation Company have a certificate of public convenience and necessity from the Interstate Commerce Commission?

A. It has.

Q. The Holland Transportation at some time, or did it sometime prior to July 11, 1952, operate or use motor trucking equipment over the highways in the transporta-[fol. 266] tion of general commodities within the scope of its licensed authority?

A. Yes, it did.

Q. Did the Company also use the flat car service of the New Haven Railroad?

A. Yes, it did.

Q. When for the first time did the Holland Transportation begin to use the flat car service of the New Haven Railroad?

A. In August, 1951.

Q. Did you or any other representative of your Company, prior to August 1951, equip the trailers in any manner

different and opposite from their usual and normal equipment for use in connection with the flat cars?

A. Yes, we did.

Q. How many such trailers were so equipped?

A. We equipped thirty-nine trailers.

Q. Thirty-nine trailers were equipped sometime prior to August, 1951, is that correct?

A. Yes.

Q. Did you or any representative of the Holland prior to August 1951, have a conversation with any business representative, agent or officer of Local No. 25?

A. Yes, I did.

Q. Holland Transportation has been under contractual relations with Local No. 25 for some many years, has it not?

A. Since 1938 I guess.

Q. And Holland's employees, drivers and helpers are members of Local No. 25?

A. Yes.

Q. You said you had a conversation with representatives of the Union. Was that conversation in connection with the proposed use of flat car facilities?

A. Yes.

Q. Approximately when was that conversation held?

A. In the early part of 1951.

[fol. 267] Q. And where did the conversation take place?

A. At the office of the Holland Transportation Company.

Q. And who was present?

A. Business Agent McCarthy, and Business Agent Norton.

Q. And yourself?

A. And myself and the shop steward of the whole Holland Transportation Company.

Q. What is the name of the shop steward?

A. Thomas Powers.

Q. Can you tell the Court what was the substance of the conversation, that is, what did you say to McCarthy and Norton or either one of them, and what did either or both of them say to you?

A. I talked,—I called their business agents in for the express purpose of discussing the proposed use of the

trailer-on-flat-car operation. I related to them that it cost in the vicinity of $100 to $120 per trailer to equip each one with the proper equipment, grappling irons and chains for the trailers, and backing blocks to enable the carrier to put the trailer on the flat car, and prior to expending this kind of money for my entire fleet, I wanted to know what restrictions there were to the use of flat car operations before I made the proposed,—made the expenditure for the equipment.

Q. Had you heard there was any restriction on the use of flat cars?

A. Yes, I heard that there was a certain limit to what portion you could put on the flat cars as against what you had to run over the road.

Q. But you didn't understand your contract provided for such a restriction or limitation?

A. Well,——

Q. The collective bargaining agreement?

A. I didn't know of any agreements in the proposed agreement, because I wasn't on the negotiations.

Q. But with respect to the Union agreement you had, [fol. 268] there was no limitation or restriction in the use of flat cars?

A. Not in the contract itself.

Q. What did they say to you when you suggested that you wanted to know if there would be any restriction of their use?

A. They said I could use the flat car operation but that I had to use all the men before I used it, I had to use all my equipment, available equipment, and my men on the seniority list before we would be able to use any of the flat car operation.

Q. In other words, that the flat car operation would be restricted to the overflow or excess after employing all of the men on your seniority list?

A. Yes.

Q. What did you say to that?

A. I said that that is agreeable with me, but what happens if we get busy, or if we have a slacking off in city work and I can't use the city men but I still have extra road

hauls, and I was led to understand I had to use everybody on the seniority before we could use flat car operation.

Q. In other words, if there was a falling off in city work and you had an excess of road work, before you could use the flat car you would have to take the city men and give them a road job even though they had not been on the road before?

A. No, I didn't have to give a road job because I didn't have the available equipment; I had to work them.

Q. You had to work them?

A. But not give them a road job; I had to work them in the city.

Q. Even if you didn't have work in the city?

A. Well, I had to make work; I had to put them on.

Q. You testified that in August 1951 you began to use a trailer-on-flat-car service. Will you describe what occurred when you first began to use the service?

A. August 1951 I finally got all of my trailers equipped, and I had two extra loads and there were no gipsies available, so I told my city drivers, one of them and then another, to take these two trailers down to the New Haven #5 yard.

[fol. 269] Q. Do you remember the names of the drivers?

A. Well, I know the driver that ultimately went down with me.

Q. Would you remember if those names were Fred Geoghan and Dan Carmody?

A. First I asked Fred Geoghan and then Carmody (?) to take those trailers down.

Q. What did they say to you?

A. They were reluctant to take them down because they had instructions that they were not to take them down, so they told me.

Q. What did you say?

A. Well, I didn't want to make an issue of it. I instructed my men to look for the shop steward. He had gone home; he worked on an early shift, and he left about 4 or somewhere from the terminal. I was unable to reach the shop steward. Instead I felt I could get hold of the business agents and straighten the matter out. So I waited until these two men checked out, and then a man that came up from Providence, because he was a city delivery driver, who

loads and unloads stuff, he comes back from Providence, he not knowing that I had spoken to the previous drivers and got a refusal, I said, "George, take this trailer down to the flat cars."

Q. Was that George Vinning?

A. Yes, and he told me that he couldn't. Evidently someone must have enlightened him as to what went on between myself and the other two. Well, time was getting late and I knew we couldn't get hold of the shop steward or the business agents, I told them that I had an agreement with my shop steward and the business agents to the effect that I could use them providing everybody was working, and that was the case; I also wanted to get them on before pull-out time, and it was getting close, I think it was close to 8 o'clock, I said to George Vinning, "I am not going to ask you to drive the truck, but in order to cover this sphere, you sit beside me on the seat, and I drove the tractor-trailer down to the New Haven yard. I came back with that driver and I drove down, he drove back because there was no driving,—he wasn't pulling a trailer coming back and I,—he could drive better than I could, and I repeated the same job on the second trailer, and I made the rails on the two of them, and I assured the driver that he [fol. 270] wasn't doing anything that he was not supposed to do, and neither was he, since he was being employed and he was getting paid the overtime for my driving that truck down there.

Q. After that transaction had been completed did you have occasion to speak with Delegates Norton and McCarthy?

A. Yes.

Q. With reference to this particular transaction?

A. Yes, I did.

Q. How long after the date of the transaction you described, did that conversation take place?

A. Within a day or two.

Q. Will you tell the Court precisely what happened and the substance of the conversation?

A. Well, evidently the activities of the previous night had reached the shop steward's knowledge and he con-

tacted the business agents, and I wanted to know how I stood for future rail operations, and asked that he call the business agents to the barn and we would negotiate another type of agreement, and McCarthy and Norton came down to the barn and I asked them why there was a refusal on the part of my men to drive the trailers down when we had reached an agreement prior to my equipping the trailers with rail irons and pinnings, and I said, "it's not necessary for me to have to drive my tractor-trailers down to the yard when I employ men to do it," and Mr. McCarthy said, "well, if I were here you wouldn't have driven even those two down," so I said, "maybe I wouldn't and maybe I would." Then we started to discuss the future operations on flat cars, and what peeved me was that we had an arrangement and I had lived up to my part of the bargain, and then after having started to use the operation or wanting to start, I didn't get the cooperation of the men, so we talked and I reminded him of our original agreement, which was that I would be permitted to use the flat cars provided all my men were working, plus two gipsies that I guaranteed employment at the time of the discussion, and that after I used the flat car operation with two loads in each direction for a period of thirty days, that I would then add another piece of Holland equipment, and at the time we made the original agreement I was only running two Holland tractors, and upon the agree- [fol. 271] ment,—this was no place to quibble, I increased the Holland operation to four. This is what I was bargaining for and I did that at the time. So I reminded Mr. McCarthy of our agreement, and finally we started to discuss about the future operations, and I said, "now Billy, if we are going to have any agreement I want some kind of memorandum to the effect that I know how I stand," and we discussed it for an hour or so, and he told me that we could operate on the flat cars on the overflow, but that we had no jurisdiction over anything coming from New York, that we agree that for a period of thirty days, four weeks, if Holland uses four trailers on flat cars per week out of Boston for a period of thirty days, that within the next thirty days it will purchase an additional piece of road equipment and substitute it for the overflow work

that went on the flat cars, and I had one of the clerks type a memorandum in triplicate.

Q. Did that memorandum incorporate your understanding of the agreement which you just described?

A. Yes, this last understanding.

Q. What did you do with the memorandum?

A. The memorandum,—I took my copy of the memorandum and I initialed it, and the shop steward, Tom Powers, I believe he initialed it, but Mr. Norton and Mr. McCarthy said that they had no right to make any alterations in agreements or contracts, and I believed they were right and I did not insist upon them initialing it, because all I wanted to use it for was something to refresh our recollection should some such occasion arise where our men would refuse to take them down.

Q. Did they say they didn't want to initial the agreement because they hadn't any right to alter the agreement?

A. They said they had no right to alter their existing agreement, and I think there was a clause in this agreement which stated the agreement itself cannot be altered by any individual agent, or something to that effect.

Q. Following that agreement which was reduced to writing, did you continue to use the trailer-on-flat-car service?

A. Yes.

Q. You used it up until July 11?

A. Yes.

[fol. 272] Q. Were some of your trucks turned back on July 11?

A. No. On July 11 we didn't have any use for the trailer-on-flat-car operations out of Boston at all. However, coming in from New York we had several trailers loaded to be shipped to Boston, and upon instructions from the local representative that there was a tie-up at the New Haven yard, instead of shipping them into Boston we re-routed the trailers via Providence and our Boston men went on to Providence and brought the trailers in for delivery in Boston.

Q. Now Mr. Rosenberg, you are familiar with the books and records of your Company?

A. Some of them.

Q. Have you had occasion to check those records before this hearing?

A. Yes.

Q. Can you tell us based on your own knowledge of the books and records what was the highest number of trailers which you sent by flat car in any one night?

A. Eleven.

Q. What was the least amount you sent?

A. There were many nights we didn't send any.

Q. I take it on the nights when you didn't send any, those were the nights when you didn't have any excess or overflow?

A. Or overflow.

Q. When you sent eleven those were the nights when all of your men were working and eleven represented the excess?

A. Yes.

Q. So that in very case the amount on the flat cars, trailers which you sent by flat car, depended on whether or not you could use up all employees or all men on your seniority list?

A. That's right.

Q. And that was the restriction which the Union had requested and which you agreed to?

A. Yes.

Q. If in the absence of that agreement and knowing your own operation, if there were no restriction would you use the flat cars to a greater extent than you did in the past?

A. I think we would.

[fol. 273] Q. Do you find it a more economical way, more efficient in operation?

A. I do.

Q. Can you state whether or not in the absence of a restriction, you would use the flat cars to approximately the high point of eleven per night which you indicated?

A. No, I don't think so, because there are some nights when we wouldn't have even eleven loads.

Q. So that a certain amount of the operation you want to go by highway, don't you?

A. Yes.

Q. But there is a certain amount you want to go by flat cars?

A. Yes.

Q. You didn't send that amount because of this restriction, is that true? The amount which you would normally want to send by flat-car is not sent by this agreement to restrict it only to the overflow?

A. That's right.

Q. Now, Mr. Rosenberg, you have appeared here today in response to a subpoena which I caused to be served upon you?

A. Yes.

Q. You did not appear here voluntarily as a witness on behalf of the Railroad?

A. No.

Q. You did not. Did you have a conversation with me prior to the trial in which you indicated to me that you preferred not to testify in a matter involving the Union?

A. I did.

Q. And that you would appear in court only because a subpoena had been served upon you?

A. Yes.

Q. You remember saying you enjoyed amicable relations with the Union which you didn't want to disturb?

A. I did.

Q. And that you would nevertheless appear in response to the subpoena of this court?

A. Yes.

[fol. 274] Q. And that is the reason you are here today, because there has been a subpoena served and you are testifying under compulsion of that subpoena?

A. Yes.

Q. I have no further questions.

Cross-examination.

By Mr. D'Arcy:

Q. You testified that you had been using this rail service out of Boston since August, 1951?

A. Yes.

Q. You have also testified that you sent out as few as no trailers on given nights, and as many as eleven on a given night, is that true?

A. As far as I know of on the flat cars, yes.

Q. Has the activity of shipping trailers out on flat cars increased, maintained its own, or been cut down since July 15, 1952, last July?

A. Has it increased?

Q. Have you increased the use of flat cars service since July 15, 1952, the date on which the original restraining order——

A. Not particularly, no.

Q. You don't believe you have done so particularly?

A. No.

Q. If you didn't use this trailer-on-flat-car service of the Railroad, how would you ship these trailers?

A. We would have to employ owner-operators or gipsies of some sort.

Q. So long as you didn't have other available equipment of your own?

A. Yes.

Q. But any time you had available equipment of your own or employees on the so-called seniority list, you would first use up all of the employees?

A. Over the road?

Q. Yes.

A. Yes.

[fol. 275] Q. You stated they all would go over the road if they didn't go on the flat cars on trailers which you had, what you did not ship on flat cars would go over the road?

A. There would be no other way for them to go that I know of.

Q. Well, all your employees, of course, are members of the Respondent Union?

A. Yes.

Q. So if you didn't use the trailer-on-flat-car service, you would give those jobs to members of the Respondent Union, whether those people are employees of yours or gipsies?

A. The gipsies wouldn't be members of Local No. 25.

Q. But might he be a member of Local No. 25?

A. Chances are he wouldn't be.

Q. In relation to Article VII of the agreement which has been introduced in evidence, Mr. Rosenberg——

A. I am aware of it.

Q. —if, as and when you had occasion to hire any gipsies

under the provisions of Article VII, would they first be members of the Union?

A. If available.

Q. In your conversations with the Union business agents, Mr. Rosenberg, did they ever indicate any antipathy towards this particular railroad?

A. Not towards the railroad, but towards the operation.

Q. Did they ever indicate to you why they had any particular grievance or why they wanted to discuss this entire matter with you?

A. They discussed with me; they didn't have any reason to.

Q. Did they have any reason for wanting to? Why were they interested in it at all?

A. I don't know their reason.

Mr. Burstein: Pray Your Honor's judgment.

The Court: I think he means,—he wants the conversation. I will admit any conversation.

[fol. 276] Q. As to discussions with the business agents pertaining to this particular, so-called rail operation, why did,—when the Union indicated to you what their position was, did they indicate why they were taking this position?

A. I don't choose to discuss it; it is something I don't think has any bearing on this case.

Q. Was it that they were trying to protect members of the Union?

A. I don't ~~know~~.

Q. Do you recall they ever said to you that they wanted to protect members of the Union, which is why they were taking this tack or position?

A. As far as I was concerned they had protected every member that I employed.

Q. That's right, as to your particular employees.

A. And I certainly have no interest in the employees of another concern.

Q. Except insofar as you were associated with them?

A. In what way?

Q. In the Employers Group?

A. I am not in the Employers Group.

Q. I have no further questions.

Redirect examination.

By Mr. Burstein:

Q. Mr. Rosenberg, can you state whether or not since the date you instituted the trailer-on-flat-car service, the amount of road drivers used by Holland Transportation has increased?

A. It's the same as it was.

Q. Do you understand that it is your obligation to maintain the equipment for all time which you had in the ownership of the Company in August, 1951,—strike it out. Is it your understanding that your Company under the restriction of the Union, is prohibited from selling equipment?

A. No.

[fol. 277] Q. Do you know of any provision in your contract which prohibits you from reducing the number of trailers or tractor-trailer units you operate?

A. Not to the tractor-trailer units, but men.

Q. So if you were to dispose of three or four units, is it your understanding that you are required to continue to employ the men who formerly operated those units?

A. Yes.

Q. Is that what the Union told you?

A. That was my understanding.

Q. Is that what the Union told you when it said you must buy additional equipment?

A. They didn't say I must buy additional equipment. It was agreed that in order for me to continue to use the flat car operation, after his call on me, that I agreed that a certain percentage of the overflow be converted to over the highway traffic in preference to the use of the trailer-on-flat-car service.

Q. Therefore, you would be unable to reduce the number of units of equipment which you operated; you would be prohibited from reducing the number of units?

A. I had no intention of reducing.

Q. But that was the purpose in mind, they said to you you might use the overflow providing you use all the equipment you might have and all the men were given employment?

A. Yes.

Q. If you had four men and four units of equipment and six trailers, you could, or theoretically you could put the addifional two on the flat cars so long as the four men were fully employed?

—. Yes.

Q. So if you sold one tractor-trailer unit, not the trailer, but unit, then you wouldn't have the work for the fourth driver. Is it your understanding you would have to keep the fourth driver on your employment books, or you are prohibited from selling the fourth piece of equipment so that you could continue to give work to the fourth man?

A. Well, by my agreement with him I should think that is what I agreed to.

[fol. 278] Q. Do the Union delegates come down to assign your men to work?

A. No.

Q. Who exactly delegates that?

A. The dispatcher.

Q. Do you know of any employer, including yourself, which has relations with the Union under the collective bargaining agreement, in the assignment of men?

A. No.

Q. If you take a road man, if a road man was assigned to city work, in other words, a fellow who went over the road was given the job of the delivery of trailers from your terminal to the railroad yard, would that be a violation of your private agreement you made with McCarthy and Norton?

A. I don't understand what you mean.

Q. Suppose we have four units and you want to send one of the four units or one of the trailers of the four units by flat car, you take the fourth driver and give him city work, not road work; would that have been a violation of your agreement?

A. Definitely.

Q. I have no further questions.

Mr. D'Arcy: I have no questions.

Mr. Burstein: I want to make this suggestion in the interests of expediting this trial; I haven't had an opportunity to discuss it with counsel. I have here a number of witnesses, the names of whom I should be very glad to supply to the Court. My own view is that the testimony of these

witnesses will be corroborative; I don't think that they aid the Court in a determination except to add to the record. I should like to stipulate.

The Court: Why don't you do it with Mr. D'Arcy, and tell him who they are and what they are going to testify, and maybe by tomororw morning you can agree.

(Further discussion off the record.)

[fol. 279] Tuesday, March 3, 1953.

DANIEL WEINER, sworn.

Direct examination.

By Mr. Burstein:

Q. Will you please state your full name and home address?

A. Daniel Weiner, 36 Hancock Street, Malden.

Q. With what company are you associated?

A. St. Johnsbury Trucking Company.

Q. In what capacity?

A. Operations manager.

Q. How long have you held that office?

A. Three years.

Q. Will you describe very briefly the business of the St. Johnsbury Trucking Company?

A. Common carrier covering the six New England States, New York and New Jersey.

Q. Does the St. Johnsbury Trucking Company hold a certificate of public convenience and necessity issued by the Interstate Commerce Commission?

A. It does.

Q. Is it part of your duties as operations manager to dispatch or arrange for the dispatch of vehicles within the scope of the cities which the certificate you hold authorizes you to serve?

A. It does.

Q. Does your Company also handle trailer units over the highway?

A. Yes.

Q. Does your Company operate trailers over flat cars or on flat cars over the rails?

A. Yes, sir.

Q. When did your Company begin to use the railroad flat car facility?

A. January, 1952.

Q. Prior to the use of the railroad flat car facility, did you or anyone under your supervision have a discussion with any representatives of the Union concerning the use by St. Johnsbury of rail facilities?

A. We did.

[fol. 280] Q. Who had the conversation?

A. I was part of the conversation.

Q. With what business representatives?

A. Mr. Sullivan and Mr. Harrington.

Q. Where did the conversation take place?

A. At our Cambridge office.

Q. In addition to yourself, Mr. Sullivan and Mr. Harrington, who,—were there any other person present?

A. Mr. Zabarsky.

Q. Will you tell the Court what you said to Messrs. Harrington and Sullivan and what they said to you?

A. Well, the conversation all boiled down that we were to use two road men per night and all the overflow was to go on the rails.

Q. Did you arrive at an understanding with them, with Messrs. Sullivan and Harrington, that you would limit the use of the rail facilities to the so-called overflow of business?

A. That's right.

Q. And was it your understanding and agreement with the Union that after having used the two road men, those highway men, all trailers left might be loaded on flat cars and brought into New York?

A. That's right.

Q. I take it you have an objection to reversing them, to go from New York to Boston?

A. That's right.

Q. You were here when one of the witnesses, I believe it was Mr. Rosenberg, described the nature of the service, and does that accurately reflect the manner you own or operate, namely, the delivery of the trailer to Yard #5, disengaging

the tractor from the trailer, and delivery of the trailer to the Harlem River Yard?

A. That's right.

Q. How many units, or how many power units or tractors does St. Johnsbury own?

A. 174.

[fol. 281] Q. How many trailers does St. Johnsbury own?

A. 270.

Q. Has it always been so, the disproportion between tractors and trailers?

A. Right.

Q. Can you tell the Court why it is that there is that disproportion between tractors and trailers?

A. Well, the necessity for spare equipment, the necessity for filling in on breakdowns and being able to have equipment at your platform while other work, while your other equipment is either on the road or working in the city, or both.

Q. I take it tractors may be used on the trailers and brought over the highway or brought down to the rail yard?

A. That's right.

Q. How many of your trailers are equipped for—with flat car service?

A. About 130 or 132.

Q. You are familiar with the operations records of your own Company, are you not?

A. Yes.

Q. Are those records made under your supervision?

A. The best part of them are.

Q. Have you had occasion to check them before this trial?

A. No, I haven't.

Q. Based on your knowledge of those records can you state the largest number of trailers that St. Johnsbury sent over the rails on any one night?

A. I believe the most we had in one night was 10.

Q. What was the least you had?

A. None.

Q. Would it be correct to state that on the occasion when you had none over the rails you only had two road jobs operating over the highway? When you had two you had them operating over the highway and ten represented the overflow?

A. Yes.

Q. If there were no restriction on the use of the rail service would the policy of St. Johnsbury, or would St. [fol. 282] Johnsbury Trucking Company have used or expanded the trailer-on-flat-car service beyond the present limits?

A. I believe we would have.

Q. Have you found the use of the trailer-on-flat-car service advantageous, beneficial and economically desirable for St. Johnsbury Company?

A. Very much so.

Q. Will you tell the Court in brief precisely what the advantages are?

A. Well, it's the difference between being flexible and being pinned down to a point where you are just handling a certain amount of traffic and that is the end of it. It fluctuates to a point whereby today you have got it, tomorrow it isn't there, and if you are in a position to take care of it you are that much to the good. It is the difference between flexibility and not.

Q. St. Johnsbury is a common carrier?

A. Yes.

Q. You have got a contract with the shippers?

A. Correct.

Q. You solicit your business in competition with many, many common carriers?

A. Very many.

Q. So that the degree to which you succeed depends in part on the flexibility of the service you offer?

A. Very much so.

Q. In your operation from Boston to New York, St. Johnsbury is authorized to serve intermittent or off-route points?

A. Yes.

Q. Where there is extra service to intermittent or off-route points, I take it operation of tractor-trailer units over the highway would be the most desirable way of operating?

A. Yes, sir.

Q. In instances, however, where you are obliged to send a full trailer load, say to Lever Brothers in New York, for delivery to the terminal or delivery to the consignee, the trailer-on-flat-car is economically advantageous?

A. It is.

Q. Has the number of employees, members of Local No. 25 employed by your Company, increased since 1947?

A. It has.

Q. I have no further questions.

[fol. 283] Cross-examination.

By Mr. D'Arcy:

Q. Mr. Weiner, this so-called restriction on the use of flat car service, did that come about as a result of various discussions between yourself and the Union representatives?

A. That's right.

Q. Was there pro and -on exchanged between the both of you at that time?

A. That's right.

Q. As to the operation of the flat car service, if St. Johnsbury did not ship any trailers on the flat cars, how would those trailers be shipped?

A. At the present time there wouldn't be any overflow, unless we purchase more equipment to move it over the road.

Q. If you got the equipment though, how would it be moved?

A. Over the road.

Q. Who would drive those trailers over the road?

A. Road drivers from——

Q. Employee-members of the Respondent Union?

A. I believe they do.

Q. Then if you don't use the trailer-on-flat-car and those trailers were to be moved by St. Johnsbury, then they would be moved by members of the Respondent Union?

A. Yes.

Q. I have no further questions.

Redirect examination.

By Mr. Burstein:

Q. You testified there was a disproportion between the number of trailers and the number of tractors?

A. That's right.

[fol. 284] Q. And in response to questions put to you by Mr. D'Arcy you said that if you didn't shift the trailers to the flat cars the trailers wouldn't go over the road at all?

A. That's right.

Q. Then you said if they moved at all they would be moved by Local No. 25 men. Will you tell us if there is a disproportion between the trailers and tractors, how could you move the trailers, the excess trailers over the road?

A. We would have to purchase additional power units.

Q. So that at the present time in order for you to transport the excess trailers over the highway your Company would be obliged to purchase tractor units, power units for the excess trailers; isn't that a fact?

A. That's very true.

Q. Does your Company have the excess tractors at this time?

A. No, sir, we don't.

Q. In order to use the excess trailers what do you estimate would be the required investment by St. Johnsbury in tractor equipment?

A. I would say roughly around $90,000 to $100,000.

Q. So that in the absence of the trailer-on-flat-car service, the trailers don't operate over the highways?

A. Under the present conditions, no.

Q. It would require an immediate investment?

A. Absolutely.

Q. Has the use of the trailer-on-flat-car expanded the volume of business enjoyed by your Company in its overall operations?

A. No.

Q. Has it created more employment for Local No. 25 men?

A. For our city men.

Q. They are employees of Local No. 25?

A. Yes.

Q. Your city men bring the trailers down to the yard?

A. That's right.

[fol. 285] Q. So that in the absence of the trailer-on-flat-car service you don't have the flexibility of operation you might enjoy; isn't that a fact?

A. Definitely not.

Q. In the absence of the trailer-on-flat-car service the

trailers don't move over the road because you don't have tractor equipment?

A. That's right.

Q. In order to do that you would have to make an investment in tractor equipment?

A. Yes.

Q. You can't use one tractor to pull two trailers?

A. Not very well.

Q. You heard the testimony, I believe of Mr. Welch, of these operations by so-called gipsy or owner-operators?

A. Yes.

Q. Based on your knowledge, and your particular knowledge of the business of your own Company, has St. Johnsbury used so-called gipsies for overflow work?

A. Never.

Q. Do you know whether or not gipsies are used in this business for overflow work?

A. I know they are.

Q. Do you know whether or not all the gipsies who are used in this area hold books or membership cards with Local No. 25?

A. I don't think so. I think most of them are owner-operated.

Q. It is a fact that many trailers or tractors are transported by non-members of Local No. 25?

A. To the best of my knowledge some of them are.

Q. I have no further questions.

Recross-examination.

By Mr. D'Arcy:

Q. You said that St. Johnsbury has not used this so-called gipsy operation?

A. No.

[fol. 286] Q. You are familiar with the provision of Article VII of the written agreement between St. Johnsbury and the Union?

A. Yes.

Q. That provides that when you have no equipment available you then hire it from other employers signatory to the agreement; that's right?

A. Something to that effect.

Q. So that if you want to use or haul these excess trailers over and above those for which you have power units, it would be possible, as matter of fact wouldn't it be required under the terms of the agreement that you hire it from other employers who are signatory to the agreement?

Mr. Burstein: I object. The contract speaks for itself.

The Court: It does.

Mr. D'Arcy: I am perfectly willing to admit the contract speaks for itself.

The Court: All right.

A. It's an interpretation. I don't know as it reads just that way.

Q. Well, isn't it possible then,—let me put it this way, for St. Johnsbury to hire equipment from other employers signatory to the agreement, to haul those trailers?

A. It is possible.

Q. So that when you say that unless we use the flat car operations these trailers wouldn't move, there is another method by which these trailers might be moved by St. Johnsbury?

A. Yes, you might, but we don't approve of a method which we have never used ever.

Q. But it is possible? It is a question of whether or not you want to use that method?

A. It could be available.

Q. It wouldn't require the immediate outlay of any sum of $90,000 to $100,000 if you chose to use this particular method?

[fol. 287] Mr. Burstein: I object. I submit these questions are speculative and conjectural.

The Court: All right; you may have the question.

A. I think in our business it would cause us the outlay, where we have never used these so-called gipsies, we would be unable nine out of ten times to obtain one, where they are busy with the customers who have used them, have been working for or going to, even though they had time, and I don't know of a single one gipsy, we wouldn't be able to give our hours over to them where we have never done business with them.

Q. Have you tried?

A. No.

Q. Then your answer is based on speculation?

A. No, it is based on the fact that I know of carriers who have called me wanting to know if I knew some gipsies or some help around available to drive for their own company, not mine.

Q. But based upon your own experience you haven't tried to use this gipsy operation?

A. No,

Redirect examination.

By Mr. Burstein:

Q. Just one question. When a gipsy owner-operator is used, a so-called lease arrangement is made?

A. That's right.

Q. Are you familiar with a pending procedure, or rather a set of rules issued by the Interstate Commerce Commission, prohibiting the use of leased equipment, except there is a thirty day period under a written agreement?

A. Yes, I understand there is some new rule to that effect; I haven't seen it myself.

Q. Do you know whether or not other motor carriers have the same disproportion of trailers and tractors units?

A. I believe it is common talk throughout the trade.

[fol. 288] Q. So that tractors are not readily available to motor carriers?

A. That's right.

Q. Therefore, your opportunity to hire tractors from other carriers is a rather limited one?

A. With the spare tractor conditions it would be very limited.

Q. I have no further questions.

Recross-examination.

By Mr. D'Arcy:

Q. Has the Union ever requested, demanded or insisted that St. Johnsbury buy new motor haulage equipment?

A. No.

Q. That's all.

Mr. Burstein: Your Honor, I should like to take one minute to discuss some possibility of stipulation.

The Court: Take all the time you want.

Mr. Burstein: May we have a five-minute recess? We may be able to expedite this.

The Court: Take all the time you want.

Mr. Burstein: Thank you very much.

(Recess.)

Mr. Burstein: Your Honor, counsel for the defendant and we have agreed to stipulate that if the persons whose names I will give the Court, were called and were asked the same questions on direct and cross which were put to Mr. Daniel Weiner, who just testified, they would make the same answers, except for one fact, which we are willing to stipulate to the Court now, that the disproportion between trailers and tractors, that is to say, the existence of the excess of [fol. 289] trailers over tractors has existed in the instance of some of the companies whose testimony would have been adduced, prior to their use of the trailer-on-flat-car-service. Now, the witnesses who would have been called and have testified in the manner which we have indicated are Mr. Edward Malkin of Malkin Motor Line, Mr. Sam Krinsky of Highway Express, Mr. Morris Levine of Benjamin Motor Express, Mr. Edward Petkowitz of New England Transportation Company, Mr. David Bianchi of the Bianchi Motor Line or Motor Express, Mr. Howard Perry, Jr. of the Harrison Motor Lines, Mr. Al Malkin of the M & M Transportation, and Mr. Mirkowich of M & M Transportation Company.

Your Honor, I should like to state for the record that all of these witnesses have been subpoenaed by the Railroad and were here under compulsion of a subpoena; no one of the motor carriers' witnesses has appeared voluntarily at the behest of the Railroad and did not offer to come here, but were required to come here by reason of the service of the subpoena.

DANIEL S. SUNDEL, sworn.

Direct examination.

By Mr. Burstein:

Q. Will you please state your full name and home address?

A. Daniel S. Sundel, 503 Washington Street, Brookline, Mass.

Q. And you are employed by the New York, New Haven and Hartford Railroad, the Petitioners here?

A. Yes, sir.

Q. In what capacity?

A. Manager of sales and service, trailers on flat cars.

Q. How long have you been employed by the New Haven Railroad?

A. For thirty-five years.

Q. How long have you held your present position?

A. Since 1947.

[fol. 290] Q. I take it you are in charge of the trailer-on-flat-car service and the books and records which the Company maintains?

A. I am.

Q. In connection with those books and records——

A. Yes, sir.

Q. —were all entries relating to the use of flat cars for the transportation on the highway of the trailers made in good faith at the time of the transaction?

A. Yes, sir.

Q. Are they made as a part of the regular and ordinary course of the business of the Railroad?

A. That's correct.

Q. Are they made under your supervision and direction?

A. Yes, sir.

Q. Were all these entries made and records maintained before the institution of the present action?

A. Correct.

Q. And was it the usual course of the business of the Railroad to make entries at the time of the events recorded or within a reasonable time thereafter?

A. Yes, sir.

Q. And have you since the date of the institution of these suits, had occasion to check the books and records of the New Haven Railroad insofar as they relate to the trailer-on-flat-car-service?

A. I have.

Q. Mr. Sundel, I believe you testified on or about July 24 that the trailer-on-flat-car-service is not restricted or confined exclusively to the Boston to New York run?

A. That's correct.

Q. And that the Railroad provides a trailer-on-flat-car-service between points other than Boston and New York?

A. Right.

Q. Are there any number of cars specifically assigned to the Boston-New York operation?

A. There are.

Q. And you are familiar with the number of cars which are assigned year by year to this particular operation, namely, Boston to New York and New York to Boston?

A. I am, sir.

[fol. 291] Q. Were flat cars for use in connection with the transportation of semi-trailers, assigned to Boston regularly during the year 1947 for the transportation of highway trailers to New York?

A. Yes, sir.

Q. In other words, I believe you testified that there is a tariff on file, filed by the motor carriers with the Interstate Commerce Commission in which the Railroad participates, is that right?

A. That's correct, yes, sir.

Q. When motor carriers offer a trailer-on-flat-car-service to customers, the rates which they quote, the charges, are those published in tariffs on file with the Interstate Commerce Commission?

A. Correct.

Q. The motor carrier then collects the charges either from the customer or consignee, depending upon the bill of lading?

A. Yes.

Q. After it collects the revenue is divided between the Railroad and the motor carrier?

A. That's right.

Q. And the operation between the motor carrier and the Railroad is in essence an interline operation, is it not?

A. Correct.

Q. Based on the records with respect to which you have just testified, and which were made in the usual and ordinary course of business of the Railroad and recorded under your supervision or direction, can you state to the Court what was the average daily number of flat cars assigned for the Boston to New York run during the year 1947?

A. Sixteen.

Q. And what was the capacity in terms of the ability to transport highway semi-trailers of those sixteen flat cars in 1947?

A. Twenty-four trailers.

Q. In the year 1947 how many units on the average of flat cars were used on a daily basis, in the year 1947 on the Boston to New York service?

A. There were eight flat cars used daily.

Q. Again on a daily basis Mr. Sundel, what was the [fol. 292] average number of semi-trailers transported on the flat cars between Boston and New York?

A. Twelve.

Q. Now Mr. Sundel, when a trailer is transported by flat car to New York, it is correct is it not, to state that a trailer comes back from New York to Boston?

A. Definitely.

Q. And comes back in what manner?

A. Via the railroad on a flat car.

Q. For the year 1947, taking into account the capacity of flat cars assigned to Boston for the Boston to New York run, and the average daily number of trailers loaded in both directions, from Boston to New York and from New York to Boston, what was the total unused capacity of the flat cars in both directions in the year 1947?

A. 7,200 trailers.

Q. If you were asked the same questions with respect to the year 1948 which I addressed to you in connection with the year 1947, what would your answer be?

A. 10,800 trailers.

Q. When you say 10,800, are you stating that the unused

capacity of flat cars in both directions for the year 1948 was 10,800?

A. That's correct.

Q. And if I addressed to you the identical questions for the year 1949 that I put to you in connection with the year 1947, what would your answer be?

A. 12,000.

Q. 12,000 trailers capacity not used in 1949?

A. Right.

Q. And for the year 1950, the same questions?

A. 13,800 trailers capacity not used in 1950.

Q. And the year 1951?

A. 19,800 trailers not used.

Q. For the year 1952?

A. 15,600 trailers.

[fol. 293] Q. Mr. Sundel, when you say unused capacity, is it your statement that the trailers were sufficiently equipped and available in adequate numbers for the Railroad to have transported those additional trailers which you have named or enumerated for the years 1947 through and inclusive of 1952?

A. That's right.

Q. Have you caused to be prepared out of the books and records of the New Haven Road a graph or chart which correlates facility, availability, number of flat cars used, and unused capacity?

A. I have.

Q. I show you a document marked 'Trailer-on-flat-car, Boston, Mass. to Harlem River, New York,'' and ask you to tell the Court what this document is,—and may I have this marked for identification?

The Court: Yes.

(D for Identification—Graph.)

(E for Identification—Graph.)

(F for Identification—Graph.)

(G for Identification—Graph.)

Q. I show you Petitioners' Exhibits D, E, F and G for Identification, and ask you to tell the Court whether you prepared those exhibits?

A. These exhibits were prepared by me.

Q. And were they prepared from the books and records of the Company?

A. That is correct.

Q. Those are the books and records which are made in the usual and ordinary course of the business of the Railroad?

A. Yes.

Mr. Burstein: I respectfully offer all the exhibits in evidence, Your Honor.

The Witness: Some of these are duplicates.

[fol. 294] Mr. Burstein: What we can do is re-number the others, if we change those. I will just offer D & R in evidence.

Q. Those are two different ones?

A. Yes.

Mr. Burstein: I should like to offer D & F in evidence.

Mr. D'Arcy: I have no objection.

(Exhibit #11 was D for Identification—Graph.)

(Exhibit #12 was F for Identification—Graph.)

Mr. Burstein: Your Honor, I am quite baffled by these. I wonder if it would be permissible for the witness to explain them rather than my reading them, and I have an extra copy for Your Honor to follow.

Q. Mr. Sundel, will you look at Exhibit #11 and tell the Court what Exhibit #11 purports to be and what it shows and what it suggests.

A. Exhibit #11, captioned 'Trailer-on-flat-cars from Boston to Harlem River,' shows a yearly graph for the years 1947 through 1952 inclusive, and the first two months of 1953. There is a line in the upper part of the graph which is subdivided at its left margin to identify the number of flat cars that have been in service and their growth up to the present time, running from approximately forty odd cars up to two hundred forty odd cars. This line depicts the total assignment of flat cars throughout the entire system for the transportation of trailers-on-flat-car. The next line purports to show the assignment of flat cars

to Boston for use to load at Boston. The third and last line indicates the actual usage of the same cars that were assigned to be used at Boston. There is a coloration in here in three divisions indicating the increased depth, that is, from a point of the diminishing line up to an increase of 240 odd cars in 1953 as against the actual usage of other trailers identified as trailers-on-flat-cars, with the surplus of unused cars identified in a color blue. This blue area represents the unused space on the flat cars that were assigned to Boston. The red area, which is the bottom one, shows the actual usage of the car space in Boston.

[fol. 295] Q. Will you look at Exhibit #12 and tell the Court what that exhibit shows?

A. Exhibit #12 is descriptive, shows total trailers moved by flat cars between all trailer-on-flat-car yards monthly for the years 1949 through 1952 inclusive, and the month of January 1953. It indicates, starting at a level of about 1,500 trailers, the growth in a line that sweeps up to approximately more than 4,000 trailers during the month of October. The graph sho that there was a tendency of increase in the year 1952, which took on added significance about the time that we had a little interference in our Boston yard. From then on——

Q. You had a lot of interference at your Boston yard?

A. I beg your pardon. The word begins with 'l', and it should be 'large.'

The Court: Is that the alleged stoppage?

Mr. Burstein: Yes.

Q. After the alleged stoppage,—so far as you are concerned the stoppage wasn't alleged?

The Court: I put that word in for the benefit of both sides.

Mr. Burstein: All right; we will respect the Judge's expression.

A. After the stoppage in Boston, the figure shows an increased useage of flat-car service producing a business which average a little better than 3,500 trailers per month for the balance of the year.

Q. Is it your statement, Mr. Sundel, that following the issuance of the restraining order, the volume of flat car

business increased in the dimensions and the degree and in the total indicated by Exhibit #12?

A. That's correct, sir.

Q. I have no further questions.

[fol. 296] Cross-examination.

By Mr. D'Arcy:

Q. Mr. Sundel, you recall back in your prior testimony at the earlier hearing you testified then, and again now, that the Railroad ships by flat car to points other than Boston to New York?

A. That's right.

Q. Would you relate again those particular points, please?

A. There is a service of a similar nature between Providence and New York, Springfield and New York, and between Boston and New Haven.

Q. Are there any points of stoppage once a trailer leaves Boston, within the confines of Massachusetts?

A. No, sir.

Q. I believe you testified, Mr. Sundel, that the motor carriers charge shippers in accordance with the rates published with the Interstate Commerce Commission?

A. That's correct.

Q. Do you know how much the motor carriers charge any given shipper for a trailer-load of freight which is shipped on flat car?

Mr. Burstein: I object on the ground it is immaterial, irrelevant and incompetent.

Mr. D'Arcy: I am trying to clear up the witness's testimony to which he testified on direct examination.

The Court: There isn't really anything right now to rebut on that line. If you want to question him, you can.

A. To answer your question, I am not responsible for that type of activity, so I don't interest myself in that.

Q. What does that mean, you know or you don't know?

A. I would say on the average I don't know.

Q. Thank you. You have testified, Mr. Sundel, as to the [fol. 297] use, or rather the unused capacity of the flat-car service since 1947, is that true?

A. Yes, sir.

Q. Was there any unused capacity prior to 1947?

Mr. Burstein: Your Honor, I submit that that would be beyond the scope not only of the direct examination, but not material here, because our recovery on damages would be limited. We have specifically limited the period for which we can recover to 1947.

The Court: Your bill alleged the period.

Mr. Burstein: Precisely.

The Court: But so that we can understand each other, I am going to give everybody all the leeway I can, and I want both sides to feel at any time if they want to save their rights, you go ahead, and I am going to be just as liberal here to you as possible.

Mr. Burstein: Thank you.

A. The counsel heard that I was appointed in 1947. I believe there was, but I am concerned with what I am responsible for.

Q. That's all right, but also within your custody are the records of the trailer-on-flat-car service prior to the time upon which you assumed these many duties, is that so?

A. Yes.

Q. Have you ever looked at those records in connection with comparison of present business as against past business, both before and after the two days?

A. I may have, but I have a very good memory.

Q. Is it your recollection then that there was unused capacity prior to 1947?

A. There may have been.

Q. Can you search your memory for a moment and tell us as to whether or not there was?

A. I believe there was.

Q. You believe there was. Then your answer would be a qualified Yes?

A. Yes.

{fol. 298} Q. You stated, Mr. Sundel, that to your knowledge, relating to the unused capacity since 1947, there were trailers available for shipment on flat cars for which there was unused capacity?

A. Will you repeat the question, please?

(Question repeated by reporter.)

A. That's correct.

Q. Do you have any idea, Mr. Sundel, as to how many trailers might have been used to reduce that unused capacity?

A. Yes, I do.

Q. Does the Railroad own any trailers?

A. No.

Q. Does the New England Transportation Company own trailers?

A. Yes, sir.

Q. Is the New England Transportation Company a subsidiary of the Railroad?

A. Yes, sir.

Q. Are you affiliated, or do you know of your own knowledge the amount of trailers available for shipment by any companies other than the New England Transportation Company?

A. Amount of shipment by any other motor carrier or shipper?

Q. Or shipper?

A. The amount that they have? Knowledge I would have of their business?

Q. Yes.

A. I don't follow you on that point.

Q. Well, what I am trying to ascertain from you is this. Do you know actually how many trailers might have been shipped by any company other than the New England Transportation Company to fill up this unused capacity?

A. Yes, I have that knowledge on the basis of the number of trailers that have been equipped for this service.

Q. Is it your testimony then that every trailer that has been equipped for this service would have been shipped on the rails each night?

A. A good part of it might have been.

[fol. 299] Q. Have you any knowledge of which part of it might have been?

A. No, I don't purport to run the other fellow's business.

Q. I shouldn't think so.

Redirect examination.

By Mr. Burstein:

Q. Mr. Sundel, Mr. D'Arcy asked you a question, whether or not you had any knowledge of the trailers equipped for use on flat cars, and I believe you testified you did have such knowledge?

A. Yes, sir.

Q. And did you have that knowledge in 1947, 1948, 1949, 1950, 1951 and 1952?

A. I did, sir.

Q. Based on your knowledge were there enough such trailers so equipped to have used all the flat car facilities that were not used in the years which we enumerated?

A. Definitely so.

Q. Was the railroad positioned to handle additional business?

A. Yes.

Q. Did the Company solicit additional business?

A. We certainly did.

Q. Did any of the motor carriers at your suggestion equip their trailers for use on flat cars?

A. At my suggestion, yes, sir.

Q. Use the year 1952 for the purpose of illustration. Now then, based on your knowledge of the number of trailers owned by the carriers with whom New Haven does business in connection with the trailer-on-flat car service, what proportion of the trailers were equipped for use on flat-cars on the average?

A. The proportion owned by motor operators?

Q. Yes, on the average?

A. I would say at least 50% or more.

Q. Would that be true for the years 1947 to 1951?

A. Relatively so.

[fol. 300] Q. Are there motor carriers in the New England area, the area in Boston, Massachusetts and whom you have known, but who do not use trailer-on-flat-car service at all?

A. That's correct.

Q. Have you attempted to get business from such carriers?

A. We have.

Q. Do you know whether any of those carriers have trailers equipped for service on the flat cars?

A. Well, those that have been qualified for.

Q. When you say qualified you mean those who have filed the necessary tariffs with the Interstate Commerce Commission?

A. That's correct.

Q. And got the necessary exemptions under Section #4?

A. That's right.

Q. Is it, based on your own knowledge, a very costly or complex task to convert an ordinary highway semi-trailer into one equipped for operations on a flat car?

A. I would say that it was a fairly costly process.

Q. About how costly?

A. It ranges anywhere from $85 to $135 per trailer.

Q. The Railroad also offers the service, does it not, to shippers?

A. That's right.

Q. There are some shippers who own their own trailers, which are equipped for flat cars?

A. Right.

Q. One further question. In the course of your examination on July 24 and when I asked you what the damage sustained by the Company was in the period July 11 to 14, you said as I recall it now, approximately $5,000. Do you recall that testimony?

A. I do.

Q. Have you since the date of that examination or hearing, had occasion to check the records and books to deter-[fol. 301] mine the precise amount in damage sustained in that July 11 to 14 period?

A. I have, sir.

Q. What is the amount of damage?

A. $4,727.

Q. I have no further questions.

Recross-examination.

By Mr. D'Arcy:

Q. Mr. Sundel, did you hear Mr. Weiner of St. Johnsbury Trucking, testify here this morning?

A. I did.

Q. Did you hear him testify that he had in the neighborhood of 100 to 132 trailers equipped for trailer-on-flat-car haulage?

A. That's right.

Q. Did you hear him also testify that some nights St. Johnsbury shipped as little as no trailers and as many as ten trailers per night?

A. I did, sir.

Q. To your knowledge are there trailers which are equipped for trailer-on-flat-car haulage which are not shipped on flat cars?

A. To my knowledge are there trailers equipped for flat cars that are not shipped?

Q. Yes.

A. I do know of some.

Q. That happens frequently or constantly, does it?

A. I will illustrate it to you. If one of the carriers has a box assigned to some distant point from Boston and the loading is late on a specific night, and the departure is such that that reaches Boston after the closing hour, that one trailer may have to go down on the highway or be held until the next day for flat-car service.

Q. In relation to your testimony concerning the specific amount of damages sustained by the Railroad between the days of July 11 and 14, how did you compute that particular figure?

A. We have a cost analyst here I think, who will act as a witness in that degree.

[fol. 302] Q. You testified to an exact figure, which was 4700 some odd dollars?

A. Yes.

Q. I would like to know how you arrived at that figure?

A. That was done on the basis of our cost analyst, and I believe that would be the sequence of the proceedings here.

Q. Is it your testimony, Mr. Sundel, that of your knowledge, by your own computing or in any other manner, you have knowledge of the exact figure?

A. Yes, I do.

Q. That's what I am trying to ascertain from you.

A. I can form a basis of the opinion, taking the full

month of July 1952, what a normal week might be, and taking into consideration all of the variables in connection with the setup, I selected a week that would be approximately identical to the week that we suffered an interference, and using those figures we had a total of 137 trailers on the exact number of days, Friday, Saturday, Monday and Tuesday, and I would like to recall to your attention the fact that we resumed operations on Tuesday shortly after 6 P.M., so that those four days represented the 137 trailers. What went down had to come back by rail; therefore, we had the total to consider, and we have the change, the excess amount that would have been earned on that figure, with our cost analyst.

Q. Then these are both gross figures?

A. I am not speaking of the number of trailers.

Q. And I am speaking of the number of dollars.

A. No, they are not gross. That's in excess of the amount we would have gained.

Q. The amount you would have taken in as a result of——

A. After all,—after the cost factor is accounted for.

Q. Is it your thought then that would have been net profit?

A. Well, I would like to avoid the word 'net,' but it would have been a profit or gain in that sense.

Q. Would it have been a gross profit or a net profit?

A. That would have been a net profit.

[fol. 303] Q. That would have been a net profit?

A. Yes, sir.

Q. Thank you.

Mr. Burstein: I have no further questions.

(A.M. recess.)

Mr. Burstein: Your Honor, I should like to recall Mr. Sundel for one question. Your Honor will recall when we stipulated with reference to the testimony of all of the other motor carriers, we made reference to the testimony of Mr. Weiner, his Company had commenced the use of the service in 1952 as I now recall it, and of course that fact would not be true in the case of the other carriers. Mr. Sundel has the dates when those services were started. I call him only for that purpose.

Daniel S. Sundel, recalled.

By Mr. Burstein:

Q. Mr. Sundel, will you tell the Court when for the first time, what year M & M Transportation Company began to use trailer-on-flat-car service?
A. 1937.
Q. And the Benjamin Motor Express?
A. Approximately at the same time.
Q. Malkin Motor?
A. The latter part of 1950.
Q. New England Transportation?
A. Approximately in 1937.
Q. Harrison Freight Line or Harrison Motor Freight?
A. 1947, or the latter part of 1946.
Q. Bianchi?
A. 1951.
Q. M & R Transportation?
A. About 1945.
Q. Highway Express?
A. 1952.
[fol. 304] Q. Those were the carriers mentioned. We have no further questions.

Mr. D'Arcy: No questions.

Alvan Hyde, Jr., sworn.

Direct examination.

By Mr. Burstein:

Q. Will you please state your full name and home address?
A. Alvan Hyde, Jr., 1539 Chapel Street, New Haven, Connecticut.
Q. You are employed by the New York, New Haven and Hartford Railroad, the Petitioner here?
A. I am.
Q. How long have you been employed by the Railroad?

A. Since 1936, except for about one year's service during World War #2.

Q. What position do you hold in the Petitioner Railroad Company?

A. I am assistant to the Director of Statistics Service Research and Cost Analysis.

Q. How long have you held that position?

A. Since 1950.

Q. To what duty were you assigned in the United States Army?

A. I was Captain in the Artillery.

Q. Prior,—did that have anything to do with cost analysis?

A. It did not.

Q. Prior to your employment by the New Haven Railroad were you employed by any other company?

A. No.

Q. What did you do prior to your employment with the Railroad?

A. I was employed by the Railroad immediately following my education.

[fol. 305] Q. Where did you receive your training?

A. I graduated from Harvard College, and took a post-graduate course in transportation at Yale.

Q. Post-graduate at Yale?

A. Yes.

Q. Following your graduation from Yale you took up employment with the New Haven Railroad?

A. Yes.

Q. Will you very briefly describe the duties to which you are assigned as the assistant to the Director in charge of Research and Cost Analysis and the like?

A. I have direct supervision of the preparation of all statistics and cost analyses for the Railroad.

Q. Do the entries which relate to the cost of operations include elements of cost for the operation of the trailer-on-flat-car service?

A. Yes, sir.

Q. Are all those entries made in good faith as part of the duties to which you and others are assigned?

A. Yes, they are.

Q. Are they made in the regular course of the Railroad's business?

A. They are.

Q. And were all the entries relating to the subject matter of this trial and trailer-on-flat-car service made before the action was instituted?

A. Yes.

Q. And was it the usual and ordinary course of the business of the Railroad, or was it your duty to make the entries at or about the time the event recorded occurred, or shortly thereafter?

A. Yes.

Q. Have you made examination of the entries to which I have referred, relating specifically however, to trailer-on-flat-car service, to determine the cost of operations and revenues received by the Railroad in the transportation of trailers from Boston to New York?

A. Yes, I have.

[fol. 306] Q. Can you state to the Court what was the average gross revenue earned per trailer trip from Boston to New York in 1947?

A. Yes.

Q. What was the average gross revenue?

A. $34.40.

Q. Can you state, based on the records to which we have referred, what was the total average cost to the Railroad in 1947 for transporting a trailer from Boston to New York?

A. Yes.

Q. And what was the cost attributable to that service?

A. $17.35 per trailer.

Q. Can you state what was the total average cost attributable to the trailer-on-flat-car service in 1947 per trailer from New York to Boston?

A. Yes.

Q. What was that?

A. $15.64 per trailer.

Q. Can you state, based on the records to which we have referred, what was the gross profit per trailer trip in 1947 from Boston to New York?

A. Yes. $17.05 per trailer.

Q. Can you state what was the gross profit per trailer trip in 1947 for an operation from New York to Boston?

A. Yes, $22.42 per trip.

Q. Considering the operation as one or consisting of a round trip, that is, Boston to New York and New York to Boston, and referring to the records compiled for the year 1947, can you state what was the average gross profit per trailer per round trip in 1947?

A. Yes.

Q. What was that?

A. $19.81.

Q. Did you hear Mr. Sundel testify as to the unused capacity of the flat cars in 1947?

A. Yes, sir.

Q. Did you have any occasion to review those records with Mr. Sundel prior to the hearing this day?

A. Yes, I did.

[fol. 307] Q. Now, based on the record of unused flat car capacity for the year 1947, can you state what was the loss of gross profits to the Railroad by reason of unused capacity in 1947?

A. Yes.

Q. What was that, sir?

A. $142,092.

Q. Can you,—if I put to you precisely the same questions for the year 1948 which I have just used in connection with the year 1947, could you tell the Court what was the loss of gross profit to the Railroad in 1948 by reason of unused capacity on flat cars?

A. Yes. $211,680.

Q. And for the year 1949?

A. $279,240.

Q. For the year 1950?

A. $297,528.

Q. And for the year 1951?

A. $373,626.

Q. And for the year 1952 up to July,—I might say for the year 1952?

A. For the complete year 1952, $294,606.

Q. Mr. Hyde, at one point in our examination we inquired as to the average gross profit per round trip Boston to New York, and you answered $19.81?

A. Yes.

Q. Isn't it your testimony that that was the average gross trip, gross profit per trip, $19.81, the average earned from Boston to New York and $19.81 for the trip from New York to Boston?

A. Yes.

Q. Did you check with Mr. Sundel to determine the exact amount of loss of profits sustained by the Railroad during the period of the interruption of service from July 11 to July 14?

A. I did.

Q. And the figure which he gave was 4,—the figure which he submitted, was that the figure you and he arrived at?

A. Yes.

The Court: $4,727.

Q. Can you state to the Court what was the total loss of gross profits to the Railroad for the period 1947 to 1952 in-
[fol. 308] clusive, attributable to the failure or the inability to use all of the flat car capacity available to the Railroad in that period?

A. Yes.

Q. What was that, sir?

A. $1,598,772.

Q. I have no further questions.

Mr. D'Arcy: No questions.

Mr. Burstein: Your Honor, the Bill of Complaint alleges damages in the sum of $100,000. At this time I respectfully move to conform the Complaint to the proof, so as to allege a loss of $1,500,000 odd, the figure testified to by the witness here.

Mr. D'Arcy: I object to the allowance of the motion.

The Court: I knew or thought you would. I will take that under advisement and I will read the pleadings again.

Mr. Burstein: I might point out, Your Honor, that the Complaint alleges a right to recover for incidental damages. It seems to me if as a consequence of acts alleged and proved, assuming they are proved, all damages which arose by reason of the tortious and enjoinable act, if there was a tortious and enjoinable act, may be recovered, and an amendment perhaps may be allowed under the general pleadings.

The Court: I think I will see counsel in the lobby now.

(Recess.)

2 P.M.

Mr. Burstein: If Your Honor please, we have one further witness that we would like to call.

[fol. 309] WILLIAM H. DAY, Sworn.

Direct examination.

By Mr. Burstein:

Q. Will you please state your full name and home address?

A. William H. Day, 4 Devereaux Street, Marblehead, Mass.

Q. With what institution or organization as you associated?

A. The Boston Chamber of Commerce, as manager of its transportation department.

Q. How long have you been associated with the Boston Chamber of Commerce?

A. Since 1924.

Q. How long have you held the position of manager of the transportation section?

A. Ever since that time.

Q. Prior to your association with the Boston Chamber of Commerce were you engaged in any way in the transportation business?

A. I have been engaged in transportation work either in the employ of buyers or sellers of transportation for fifty years.

Q. I take it you are familiar with the type of transportation facilities which are available in the New England area.

A. Generally speaking, yes, sir.

Q. Mr. Day, you have been admitted to practice before the Interstate Commerce Commission as a practitioner, have you not?

A. Yes, sir; thirty-five years I think.

Q. I take it you had occasion to appear before the Com-

mission to prepare research and studies for the Commission in connection with various proceedings before the Commission?

A. That's right.

Q. I take it you have appeared in other matters which apparently related to transportation?

A. That's correct.

[fol. 310] Q. Are you familiar with the type and kind of motor carrier services which are available in the New England area?

A. Generally speaking, yes.

Q. Are you familiar with the carriers, motor carriers who have authority from the Interstate Commerce Commission to render services from, to and between points in Massachusetts and points in other States?

A. Generally speaking.

Q. Are you familiar with the road service, the road facility known as trailer-on-flat-car service?

A. Generally speaking, yes.

Q. I take it you have seen how that service operates?

A. Yes.

Q. You are familiar I take it, with the fact that motor carriers who render service between Boston and New York, file a tariff of rates and charges with the Interstate Commerce Commission in which they hold out a trailer-on-flat-car service, and you are familiar, are you not, with the manner in which the trailer-on-flat-car service is performed?

A. That's correct.

Q. And based on your knowledge of that service and your general knowledge of transportation, will you describe that service as an interline arrangement between the motor carriers and the Railroad?

A. As interline operation here is a practice which is pretty generally pursued. You take trucks loading in the late afternoon in the northern country, either in northern Massachusetts, southern New Hampshire, southern Maine, those travel to Boston where through an interline operation the trucks are placed on flat cars, transported to the Bronx in New York, where they are unloaded, and there they will be taken by tractors either for local delivery in Manhattan

or in that neighborhood, or perhaps for further points as far off as southern Pennsylvania.

Q. Mr. Day, would it be correct to state that in an interline arrangement two or more carriers participate in the transportation of the lading or freight?

A. That's true.

Q. Would it be correct to state where two mo carriers participate in an interline arrangement, the practice is for [fol. 311] the original carrier to deliver a trailer to the delivering carrier, who thereupon engages the trailer to a tractor owned by the delivering carrier and makes the ultimate delivery?

A. That's correct.

Q. Would it be correct to state Mr. Day, with an interline arrangement the lading is exchanged, but the lading is transported in the same container in which it originates?

A. That's right.

Q. That would be true whether two motor carriers participate in an interline arrangement or where a motor carrier interlines with a rail carrier?

A. There would be some instances where motor carriers might transfer. The more common practice would be just to change tractors, in which case it would be identified——

Q. Isn't it a fact where the lading is changed, that is called an interchange arrangement as distinguished between an interline?

A. That's right.

Q. You have been in this area for a great many years and you have testified that you are familiar with motor-carrier operations. Are you familiar with an operation which is colloquially known as "gipsy operation?"

A. I have heard of it many times.

Q. What is gipsy operation, or who is a gipsy operator?

A. From my experience in the trade, a gipsy is understood to be one of those who has a truck which he is willing to hire out to anyone who wants one hired out for a specified, agreed upon amount required to do it for the job.

Q. A gipsy might be a driver who owns a truck who is willing to hire out his truck?

A. It would be, yes.

Q. And he might be a gentleman who owns both tractor and trailer?

A. That's correct.

Q. But a gipsy is a carrier who has no authority from the Interstate Commerce Commission to operate?

A. Generally speaking that is true.

[fol. 312] Q. And he, therefore, leases out his equipment to motor carriers. In that instance there you have a gipsy operation?

A. That's correct.

Q. Are you familiar with the equipment and availability and kind of equipment which are used by motor carriers in this area?

A. Generally speaking.

Q. Will you say there has been and there is a sufficiency of motor carrier equipment?

A. No, the reverse. I would say that in normal instances there is a lack of sufficient equipment by many carriers.

Q. You are familiar with the fact that there is a general disproportion between the number of trailers and tractors owned and operated by motor carriers?

A. That's right; there are a number of excess trailers.

Q. Would that be one of the reasons why gipsy operators have been engaged and still are being engaged in this area?

A. I think so.

Q. And is there a great abundance of gipsy operators in this area?

A. A very large number of them.

Q. Are you familiar with the recent proceeding before the Interstate Commerce Commission concerning leasing, ex parte NC 43?

A. Generally.

Q. You are familiar with the finding of the United States Supreme Court sustaining the order of the Interstate Commerce Commission, which promulgated the leasing of equipment contained in ex parte NC 43?

A. That's right.

Q. Do you know whether or not among the rules is one which prohibits a motor carrier from leasing equipment except pursuant to a written contract of the duration of not less than thirty days?

A. Yes.

Q. Can you state to the Court what in your opinion will be the effect of this decision on the practice of hiring gipsy operators by motor carriers?

A. I have given it considerable thought, having in mind [fol. 313] the great extent to which they have been used, and the likelihood when the Commission commences to enforce this new thirty day rule, existing practice will have to be eliminated, and I have reached this conclusion, that there just isn't going to be trucks enough available with the regular operators to do the business that needs to be done; in other words they will not be able to fully take care of the existing traffic.

Q. Except, of course, if carriers in this area make very substantial investments in tractors?

A. That's correct.

Q. Based on your knowledge and the history of motor transportation in this country and transportation generally, do you have an opinion which you can state respecting the degree of employment which is affected by the use of trailers-on-flat-car?

A. I think personally, as I have watched it develop over the years that it has many advantages.

Q. Does it represent a degree of employment?

A. No question at all about it, and it is one which has contributed in a substantial way in my opinion towards the economic growth and prosperity of this area. For instance, there is no question of doubt as to the economies and efficiencies of that particular type of service you refer to. Now, those things contribute towards the induction and development of satisfied customers. Satisfied customers means increased production, and increased production means increased employment, which is very, very important in this area.

Q. Are you familiar with a study by a committee known as the Presidents' Committee or the New England Committee?

A. Generally.

Q. Have you seen the report? I think Benjamin Harris or Harrison wrote the report.

A. I have reviewed it.

Q. Do you recall a reference made to the need for ex

panding transportation facilities in New England insofar as the New England economic problem?

A. I remember I bore down on that very substantially.

Q. Do you have an opinion which you can state as to the need for additional and more efficient transportation facili- [fol. 314] ties in the New England area?

A. You have got to bear in mind, as I see it, that New England is situated away up here in the northeast section of the country. It is far removed from the source of most of its raw materials. It is far away from many of the principal consuming markets, and those long-distance transportation charges are necessarily high. Now, during recent years there has been a growing tendency, as I see the picture unfold, for people to enter more and more into ordering quick buying; by that I mean that they place orders today and they want deliveries tomorrow. If they can't get them the trend is, the tendency is to go elsewhere where they can get them, because that is the modern way of doing business. Now, all of these changes which are taking place manifest, in my opinion, the need for good service, plenty of service and reasonable rates, and I think so far as transportation for New England is concerned, we can stand more of it.

Q. Will you state that the expanded use of the trailer-on-flat-car service would make a contribution to the improvement of New England's economics by expediting delivery and satisfying more customers?

A. I say it would help very substantially.

Q. As a matter of fact the trailer-on-flat-car service has been in effect for several years. Is it your judgment or opinion that it has contributed to the improvement of the economic status of the New England area?

A. I don't think there is any question of doubt on that one.

Q. Your answer is Yes?

A. Yes, absolutely Yes.

Q. You made reference to the possibility of high speed delivery through delivery on trailers-on-flat-cars, and I would like to put this concrete question to you. Where a shipment of merchandise will begin in Providence or Portland, Maine,—let's say Portland, Maine, is it possible

by highway transportation to get 24 hour service into New York?

A. It might be possible but it is most unusual and doubtful.

Q. Is it possible with the use of the trailer-on-flat-car service?

A. Yes, but assurances are needed to get our trade by following that route.

[fol. 315] Q. Based on your experience as one of the officials of the Chamber of Commerce, with the shipment of goods of any of the industries in this area, can you tell whether or not the availability of the trailer-on-flat-car service has made possible fast and more expeditious delivery of commodities manufactured in this area, as for example, shoes?

A. That's true.

Q. Can you give us a concrete example of that?

A. You take,—I mentioned a few minutes ago this inclination to quick buying. Now, using shoes as illustrative. The average retailer in New York City on shoes does business entirely on this basis. In mid afternoon it is his custom to go over the shelves and find out how many pairs of shoes have been sold up to that time, and having so determined he then goes to either a teletype or telephone and places an order in the New England area to whatever extent is necessary to fill up the vacancies caused by the day's sales. Now, to him it is most important to have those shoes there for sale when he opens for business the following day. Under the type of service that we are discussing it is possible, and it has worked out as a practical matter in many instances, that through this interline of operation of trucks from the interior communities in connection with this all-rail service from Boston to New York, there is reasonable assurance that Mr. Retailer is going to have his shoes rolling down Broadway the next morning.

Q. That reduces, at least in part, the need somewhat, the need to maintain a large inventory?

A. That's correct.

Q. One further question. Highway transportation is subject, is it not, to the vicissitudes of the weather?

A. Correct.

Q. And in very bad weather, winter weather, there are delays in transportation over the highways. Can you state whether or not the use of trailers-on-flat-car reduces or eliminates the risk of the weather conflicting with transportation?

A. There is no question of doubt but what over the car road from New York to Boston you have pretty reasonable assurance that your freight is going to roll in on time. On the other hand, where you operate over the highway and have the hazardous conditions of the weather, particularly [fol. 316] in the winter months, there is always an element of uncertainty as to when they will arrive, which doesn't exist as to the other mode.

Q. Mr. Day, you have made reference to the thirty-day lease rule. Based on your knowledge of the transportation requirements in this area and on the availability of freight, the carriers of freight, can you state whether or not it is possible for a motor carrier in this area who owns an excess of trailers, to enter into thirty-day period agreements with gipsy operators ow-ing their own tractors?

A. I would doubt it very much.

Q. That's because there isn't a certainty of the flow of traffic?

A. That's correct.

Q. It has been suggested,—you were not here, but it has been suggested that if the trailer-on-flat-car service was not available, that the freight would move anyhow. Now I ask you, if trailer-on-flat-car service was not available, in your judgment would the trailers which now move over the rails, move over the highways?

A. No, I doubt very much if they would. In the first place they wouldn't have tractors enough to take them over the highway, and if they did, were able to acquire tractors enough to do it, then for the,—on account of the hazardous driving over the road, I have my doubts as to whether or not they could maintain the degree of satisfaction that has been built up vis this rail form, and which has contributed so much towards our growth and prosperity.

Q. Would you say that the use of the trailer-on-flat-car service would expedite, because of the fast and efficient transportation as explained generally, the volume of trans-

portation into and out of the New York area and the New England area?

A. Yes, sir.

Q. Thank you sir.

Cross-examination.

By Mr. D'Arcy:

Q. Mr. Day, in your last few answers you have stated that in your opinion if the trailer-on-flat-car service which is presently being used, were to cease being used, that those [fol. 317] same trailers would not move over the road in transportation. That's your considered judgement I take it?

A. I said, if my memory serves me correctly, that first they wouldn't be able to move over the road because in my opinion there wouldn't be tractors enough to move them, and second, I said if they were able to acquire tractors enough to move them I should think the difference in the service might tend to restrict some of the traffic which is now moving.

Q. I take it, Mr. Day, in stating that opinion of yours you do not mean to imply that the freight would not move by virtue of those trailers, either over the road or on the rails, would not move in commerce?

A. It might not move to New York.

Q. Or it might move as fast or might go faster if it went by air?

A. Yes.

Q. But it would move in some direction?

A. It might and might not. Let's say as a result of a superior quality of service via a medium of transportation, there has been developed a field for disposal of New England products that didn't previously exist. Now, if you remove that service then inevitably you commerce to get complaints and lose those orders that were built up as a result of it. Now, it is true that perhaps the industry that produces those things might be able to produce other prospects and sell them somewhere else, but so far as that particular instance is concerned, if a type of service develops business and then you remove that type of service, conversely your business

goes down, it is no longer there, because it did not meet the requirements.

Q. I have no further questions.

MOTIONS TO AMEND PLEADINGS TO CONFORM TO PROOF

Mr. Burstein: No further questons. Your Honor, at this time the Petitioner rests, and of course we renew our motion to amend the Complaint to conform to the proof.

Mr. D'Arcy: Insofar as the Respondents have entered pleadings, I should like to join in a motion on behalf of the Respondent that any pleadings conform to the proof. I [fol. 318] should like to state we are not going to offer any further witnesses at this time. I think all the case has been gone into quite thoroughly at the previous trial, the transcript of which has been stipulated into evidence here. We think the entire case rests within that transcript.

The Court: May I talk to counsel just a moment, please?

(Conference at the bench not reported.)

(Court adjourned to March 4, 1953.)

March 4, 1953.

* * * * * * *

IN SUPERIOR COURT OF SUFFOLK COUNTY

RESPONDENTS' REQUESTS FOR RULINGS OF LAW AND RULING THEREON—Filed March 16, 1953

The Respondents, each and every of them, respectfully request this Honorable Court to grant the following rulings of law:

1. The Respondent Union's disputes with various employers (motor carriers) with whom it has collective bargaining agreements and the peaceful concerted activities in which the Respondent Union and individual Respondents have engaged, in furtherance thereof, affects commerce within the meaning of Sections 2(6) and (7) of the National Labor Relations Act as amended, the so-called Labor-Management Relations Act of 1947 (Taft-Hartley Act).

2. It having been alleged in the complaints that unfair labor practices within the meaning of the National Labor Relations Act as amended have been committed by the Respondent Union and individual Respondents, that Act vests the National Labor Relations Board with exclusive primary jurisdiction to determine how much of this peaceful concerted activity shall be prohibited by injunction.

[fol. 319] 3. Said concerted activities are in the field covered by the National Labor Relations Act as amended, and are therefore preempted and closed to State regulation.

4. This Court is without jurisdiction to enjoin said concerted peaceful activities and its action in so doing would infringe upon the exclusive federal field which the National Labor Relations Act as amended preempts, and would infringe upon the exclusive jurisdiction of the National Labor Relations Board, and would deprive the Respondent Union and individual Respondents of rights protected under the Constitution of the Commonwealth of Massachusetts and the First and Fourteenth Amendments to the Constitution of the United States.

5. The Respondent Union's disputes with the aforementioned employers (motor carriers) is a "lawful labor dispute" within the meaning of Chapter 149 of the General Laws, Section 20C, as amended by Section 2(d) of Chapter 452 of the Acts of 1950.

6. None of the activities of the Respondent Union or individual Respondents constitutes activity in furtherance of an "unlawful secondary boycott" within the meaning of Chapter 149 of the General Laws, Section 20C, as amended by Section 2(f) of Chapter 452 of the Acts of 1950.

7. None of the activities of the Respondent Union or individual Respondents were unlawful in and of themselves nor were they unlawful by reason of their methods.

8. In view of the foregoing conclusions, a permanent injunction as prayed is unnecessary and improper and would be improvidently or erroneously issued within the meaning of Chapter 214 of the General Laws, Section 9A(6), as amended by Section 3 of Chapter 452 of the Acts of 1950.

9. In view of the foregoing conclusions, and in view of the fact that the original Bill of Complaint alleged activities (paragraphs 13 and 14) directed only at employers (motor carriers) with whom it was alleged the Respondent Union

had a labor dispute (paragraph 17(d)), the temporary re-
[fol. 320] straining orders and/or injunction heretofore issued and continued, was improvidently or erroneously issued within the meaning of Chapter 214 of the General Laws, Section 9A(6), as amended by Section 3 of Chapter 452 of the Acts of 1950.

Respectfully submitted, Stephen J. D'Arcy Jr.,
Attorney for the Respondents.

March 16, 1953.

The within requests for Rulings of Law are denied.
William C. Giles, Justice of the Superior Court.

IN SUPERIOR COURT OF SUFFOLK COUNTY

REPORT OF MATERIAL FACTS AND ORDER FOR DEGREE—March 16, 1953

The petitioner is engaged as a common carrier in the transportation of freight and passengers by rail subject to the provisions of the Interstate Commerce Act and to the provisions of the Railway Labor Act.

The respondent union is a voluntary unincorporated association of employees organized for the purpose of dealing with motor carriers concerning terms and conditions of employment of motor carrier employees. None of the respondent union's members is employed by the petitioner.

The individual members of the union are too numerous to mention but the respondent Jenkins is the President of [fol. 321] the union, the respondents Norton and McCarthy are the duly authorized and designated business agents or delegates of the respondent union and are fully representative of the entire membership of said union.

Since 1937 the petitioner has transported motor truck trailers on flat cars by rail in interstate commerce. The trailers are hauled by tractors operated by members of the respondent union to Number 5 Yard of the petitioner in Boston and are there loaded upon flat cars of the petitioner which has spent substantial sums in the construction of such flat cars and which are so con-tructed that the are of little or no use except in the transportation of trailers.

The respondent union has collective bargaining agreements with various employers (motor carriers) in and around Boston and is a recognized bargaining agent of their employees. The union has no dispute with any of these employers concerning the performance of any collective bargaining agreements.

The union through the individual respondents and other members have for some time been desirous of securing freight which the petitioner transports on its flat cars and of securing it for transportation in its members' trailers; such transportation to be conducted over highways to various points both within and without the Commonwealth of Massachusetts.

On or about July 11, through July 14, 1952 the respondents authorized and caused to be established picketing on the petitioner's premises, or nearby, at No. 5 Yard adjacent to Nort[illegible]n Avenue in South Boston. They induced and persuad[illegible] employees of the New England Transportation a subsidiary of the petitioner to refuse to perform their duties on said premises. They persuaded and induced the employees of various persons doing business with the petitioner to refuse to permit motor truck semi-trailers to be detached from tractors on or near said premises; and to refuse to drive tractors or to haul trailers to the premises of the petitioner.

The respondents caused to occur a concerted cessation of work and a withholding of service and business the object [fol. 322] of which was to force users of the petitioner's flat car service to cease doing business with the petitioner.

The respondents caused to occur and induced and encouraged a concerted cessation of work and a withholding of service the object of which was to force the petitioner to cease doing business with users of *of* its flat car service.

The greater part of the petitioner's current business has not been processing, selling, handling, transporting or otherwise dealing in any goods of the users of the petitioner's flat car service.

There has not existed nor does there exist any agreement, understanding or arrangement with users of the petitioner's flat car service according to which the petitioner will be or has been required to use or is using its own employees to perform work or service which would be done by the em-

ployees of users of the petitioner's flat car service in the absence of a labor dispute.

The respondents have threatened to continue the unlawful acts set forth above and will in the future commit said unlawful acts unless enjoined.

The unlawful acts, set forth above, were committed, authorized or ratified by the respondents.

Substantial and irreparable injury to the petitioner's business will follow unless the respondents are enjoined.

As to each item of relief granted greater injury will be inflicted upon the denial of relief than will be inflicted upon the respondents by the granting of relief.

The petitioner has no adequate remedy at law.

The public officers charged with the duty to protect the petitioner's property are unable to furnish adequate protection.

[fol. 323] The petitioner has made every reasonable effort to negotiate and settle all differences with the respondents and has complied with all obligations imposed by law upon it with reference to this suit.

I find that this suit does not involve or grow out of a labor dispute as the term "labor dispute" is defined in Chapter 149 Section 20C of the General Laws (Ter. Ed.).

I find the respondents have damaged the petitioner in the sum of $4727.—

If there was a labor dispute I find that the objective and the means used were unlawful and that the union was guilty of an unlawful secondary boycott.

Let a Decree be prepared and entered permanently enjoining the respondents, agents, attorneys and counsellors, and each and every one of them to desist and refrain from interfering with the petitioner's business by inducing, threatening or hindering any person, company, corporation, firm or association from delivering semi-trailers for transportation on the petitioner's flat cars or from entering or leaving the premises of the petitioner's railroad yard for the said purposes; and from picketing or otherwise patrolling the premises of the petitioner's railroad yard or in any other way to interfere with or prevent the loading or unloading of freight of any kind, or nature or description from or to semi-trailers, flat cars, box cars or other transportation equipment used and employed by the

petitioner; and ordering the respondents to pay to the petitioner the sum of $4727.

William C. Giles, Justice of the Superior Court.

IN SUPERIOR COURT OF SUFFOLK COUNTY

FINAL DECREE—Entered March 26, 1953

This cause came on to be further heard at this sitting and was argued by counsel; and thereupon upon consideration thereof it is Ordered, Adjudged, and Decreed:

[fol. 324] I. The Respondents and their agents, attorneys and counsellors, and each and every one of them are permanently enjoined and shall desist and refrain from interfering with the petitioner's business by inducing, threatening or hindering any person, company, corporation, firm or association from delivering semi-trailers for transportation on the petitioner's flat cars or from entering or leaving the premises of the petitioner's railroad yard for the said purposes; and for picketing or otherwise patrolling the premises of the petitioner's railroad yard or in any other way to interfere with or prevent the loading or unloading of freight of any kind or nature or description from or to semi-trailers, flat cars, box cars or other transportation equipment used and employed by the petitioner;

II. And the respondents are further ordered to pay to the petitioner the sum of $4727.00.

By the Court, (Giles, J.), Mary G. Murphy, Asst. Clerk.

IN SUPERIOR COURT OF SUFFOLK COUNTY

RESPONDENTS' APPEAL—Filed April 14, 1953

Now come the Respondents, each and every one of them, and herewith file their appeal to the Supreme Judicial Court from the final decree entered in this matter by the Superior Court on March 26, 1953.

And further, the Respondents herewith appeal the Superior Court's denial of the Respondent's requested Rulings of Law.

Respectfully submitted, Stephen J. D'Arcy Jr., Attorney for the Respondents.

[fols. 325-326] Judge's Certificate to Exhibits omitted in printing.

[fols. 327-330] Judge's and Clerks' certificates omitted in printing.

[fols. 330-332] IN THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS, AT BOSTON

November 17, 1954

IN THE CASE OF THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY

vs.

EDWARD F. JENKINS & OTHERS

RESCRIPT—November 17, 1954

pending in the Superior Court for the County of Suffolk

Ordered, that the clerk of said court in said county make the following entry under said case in the docket of said court; viz.,—

Interlocutory decrees affirmed. Final decree to be modified by striking out the last sentence ordering "the respondents" to pay and substituting therefor a provision ordering William J. McCarthy and Michael J. Norton to pay the sum of $4,727, together with interest from the date of the filing of the bill and costs of this appeal, and as modified is affirmed.

By the Court, Frederick L. Quinlan, Clerk.

November 17, 1954.

Brief Statement of the Grounds and Reasons of the Decision:

See opinion on file

Copy,

Attest:—Thomas Dugan, Clerk.

[fol. 338] In the Supreme Judicial Court of Massachusetts

Opinion—November 17, 1954

Ronan, J. These are appeals from certain interlocutory decrees and from a final decree granting an injunction restraining the three named individual defendants and the other members of Local Union No. 25 of the International Brotherhood of Teamsters, Chauffers, Warehousemen and Helpers of America from inducing or encouraging any person to refuse to load trailers or threatening or hindering any person or company from delivering trailers for transportation upon the plaintiff's flat cars, from entering the plaintiff's freight yard for said purpose, and from picketing the said yard for the purpose of preventing the loading or unloading of said trailers, and awarding damages to the plaintiff.

Upon the filing of the bill a temporary restraining order was issued ex parte and a preliminary injunction was granted after a hearing following the return of the order of notice. A single justice of this court, to whom the propriety of granting the injunction was reported, refused to set aside the injunction. The suit was then heard on the merits in the Superior Court upon oral evidence and, by agreement of the parties, upon a transcript of the evidence adduced at the hearing upon the return of the order of notice. A final decree followed granting injunctive relief and awarding damages.

The appeal from the final decree is here upon a report of the material facts and a transcript of the evidence, and opens up for our determination questions of law, fact, and discretion. We can find for ourselves facts in addition to those found by the trial judge and facts contrary to those found by him if we are convinced that his findings are

plainly wrong. *Trade Mutual Liability Ins. Co. v. Peters*, 291 Mass. 79. *Lowell Bar Association v. Loeb*, 315 Mass. [fol. 334] 176. *291 Washington St., Inc. v. School St. Liquors, Inc.* 331 Mass. 150.[1]

We now proceed to summarize briefly the facts.

The plaintiff is a railroad engaged in the carriage of passengers and the transportation of freight between places within and without the Commonwealth. It began in 1937 to transport trailers on flat cars between Boston and points outside the Commonwealth, principally to and from New York city. Trailers to be shipped from Boston were hauled into the plaintiff's Boston freight yard where they were detached from the tractors, left in the freight yard, and loaded upon the flat cars by employees of the New England Transportation Co. The business of transporting trailers to and from New York has steadily increased. The plaintiff has purchased 200 flat cars especially designed for this service and these, together with the construction of ramps and other necessary structures, represent an investment of more than $3,000,000. The total receipts from this service in 1951 amounted to about $1,000,000 which was less than one per cent of the total receipts derived by the plaintiff from the operation of its entire system.

Local No. 25 is a voluntary trade association or union, and the three named individual defendants occupy the offices ascribed to them in the bill and fairly represent the remaining members of the union. The union has about 9,000 members and is comprised of those who are employed as operators or helpers upon trucks or tractors of motor carriers doing business in Boston and engaged in the trans- [fol. 335] portation of goods within and without the Commonwealth. It has collective bargaining agreements with these motor carriers. These carriers transport freight over the road between Boston and New York, but in recent time they have been making more use of the rail service furnished by the plaintiff. The union has viewed with alarm this increased rail service as it deprived its members of work they otherwise would have had of driving the tractors

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[1] Mass. Adv. Sh. (1954) 163.

with the trailers over the highways. In recent years drafts of collective bargaining agreements containing provisions restricting the use of rail transportation were submitted to the motor carriers for execution at the expiration of existing agreements, but the carriers refused to sign and the union agreed to the elimination of these provisions. The agreements were then executed. Agreements with the motor carriers in this form were in existence on the three days in July, 1952, hereinafter mentioned. Notwithstanding the attitude of the motor carriers in refusing to assent to a limitation of this rail transportation, representatives of the union conducted oral, collateral, and informal negotiations of uncertain content and doubtful import with some of the motor carriers seeking to restrict the use by the latter of the rail facilities furnished by the railroad. The union properly does not contend that such dealings resulted in any agreement of binding force and effect upon the motor carriers. They may have been undertaken by these representatives of the union to alleviate the tension within the union created by members who for some time had been insisting that rail transportation of trailers, commonly known in the transportation trade as "piggyback trucking," should be stopped or at least restricted. This subject was not included in the existing bargaining agreements, and we are satisfied that if the [fol. 336] union desired a modification of the agreements it did not adopt the course outlined in the agreements to secure a modification. The relations between the motor carriers and the union concerning this mode of transportation had become unsteady and strained, but all parties were seemingly reluctant to force the issue. Finally on the late afternoons of July 11, 12, and 14, 1952, the defendants McCarthy and Norton, business agents of the union, took positions on the street near the entrance to the plaintiff's freight yard, stopped various tractors hauling trailers belonging to motor carriers who had collective bargaining agreements with the union, and ordered them to drive away from the freight yard, which the operators did. Some of the trailers of these motor carriers were already in the freight yard when McCarthy and Norton appeared, and were ready for loading, but they were not loaded because

of the orders given by McCarthy and Norton to the employees of New England Transportation Co. These two union representatives were in the freight yard on one of these afternoons for a short period of time carrying out their purpose of preventing the rail transportation of the trailers. Their conduct at no time was disorderly or other than peaceful. Although it did not appear that McCarthy and Norton were acting under any direct or specific instructions from the union, the union seeks to justify their conduct on the ground that they were acting in its behalf in attempting to make more work available for its membership if the rail transportation was prevented or restricted. The motor carriers are not parties to this suit.

The New England Transportation Co., a corporation, hereinafter called New England, is "a subsidiary" of the railroad. Nothing more definite of its relationship to the railroad appears. Trailers are left in the freight yard by [fol. 337] the motor carriers and are loaded upon the flat cars by employees of New England and are fastened to the cars by employees of the mechanical department of the railroad. The reverse process is used on inbound trailers. The employees of New England are members of the union. New England has a collective bargaining agreement with the union, but it has no contract with the motor carriers.

Injunctive Relief.

The parties in the present suit from the outset have recognized that the crucial question is the jurisdiction of the Superior Court to grant injunctive relief. Shortly before the bill of complaint was filed in the instant case, the United States District Court had dismissed, after an ex parte hearing, a bill filed by the railroad. The last amendment to the bill filed in the Superior Court was based upon *In re Washington-Oregon Shingle Weavers' District Council*, 101 N.L.R.B. 1159,[1] but we need not analyze that decision as we see nothing in it that tends to support the railroad's contention that the Superior Court had juris-

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[1] See *National Labor Relations Board* v. *Washington-Oregon Shingle Weavers' District Council*, 211 Fed. (2d) 149.

diction to restrain a violation of the secondary boycott provisions of the national labor relations act, § 8(b)(4)(A), as amended by the labor management relations act, 1947, U.S.C. (1946 ed.) Sup. V, Title 29, § 158(b)(4)(A). The railroad has now abandoned that contention but still contends that it is entitled to relief under the statutes and decisions of this Commonwealth.

[fol. 338] One of the principal contentions of the union is that the subject matter of this suit comes within the exclusive jurisdiction of the national labor relations act of 1935, U. S. C. (1946 ed.) Title 29, § 151 et seq., as amended by the labor management relations act of 1947, U. S. C. (1946 ed.) Sup. V, Title 29, § 141 et seq., the Taft-Hartley act so called, hereinafter referred to as L. M. R. A. The union upon the facts found urges that it has engaged in a secondary boycott against the railroad in violation of § 158 (b) (4) (A) of said Title 29. The railroad was a neutral employer and so was New England. The union argues that L. M. R. A. has preëmpted the field and that there is no room for the operation of the laws of the Commonwealth to enjoin this secondary boycott. *Bethlehem Steel Co.* v. *New York State Labor Relations Board*, 330 U. S. 767; *La Crosse Telephone Corp.* v. *Wisconsin Employment Relations Board*, 336 U. S. 18. *Plankinton Packing Co.* v. *Wisconsin Employment Relations Board*, 338 U. S. 953. *International Union of United Automobile, etc. Workers of America, C. I. O.* v. *O'Brien*, 339 U. S. 454. *Amalgamated Association of Street, Electric Railway & Motor Coach Employees of America, Division 998* v. *Wisconsin Employment Relations Board*, 340 U. S. 383. *Montgomery Building & Construction Trade Council* v. *Ledbetter Erection Co., Inc.*, 260 Ala. 382. *Gerry of California* v. *Superior Court of Los Angeles County*, 32 Cal. (2d) 119. *McNish* v. *American Brass Co.*, 139 Conn. 44. *Norris Grain Co.* v. *Seafarers' International Union of North America, A. F. L., Canadian District*, 232 Minn. 91. *Pittsburgh Railways Co. Substation Operators & Maintenance Employees Case*, 357 Pa. 379. The principle that a State court has no jurisdiction to restrain an unfair labor practice in the nature of a secondary boycott in an industry affecting commerce has recently been [fol. 339] affirmed by the Supreme Court of the United States. *Garner* v. *Teamsters, Chauffeurs & Helpers Local*

Union No. 776 (A. F. L.), 346 U. S. 485. *Building Trades Council* v. *Kinard Construction Co.*, 346 U. S. 933. *Capital Service, Inc.* v. *National Labor Relations Board*, 347 U. S. 501.

In the next place, a bill of complaint brought for an injunction and based on a violation of § 158 (b) (4) (A) cannot be maintained by the railroad in its own behalf. It is settled that neither a Federal nor a State court has jurisdiction to restrain the commission of an unfair labor practice affecting commerce in proceedings begun in court by the injured party. *Amazon Cotton Mill Co.* v. *Textile Workers Union of America*, 167 Fed. (2d) 183. *Amalgamated Association of Street, Electric Railway & Motor Coach Employees of America* v. *Dixie Motor Coach Corp.*, 170 Fed. (2d) 902. *Schatte* v. *International Alliance of Theatrical Stage Employees & Moving Picture Machine Operators of United States & Canada*, 182 Fed. (2d) 158. *Studio Carpenters Local Union No. 946* v. *Loew's, Inc.*, 182 Fed. (2d) 168, certiorari denied 340 U. S. 828.

We are not, however, prepared to agree with the union that the only means open to the railroad to secure injunctive relief was through a charge filed by the railroad with the national labor relations board and by subsequent proceedings by the board. In *International Rice Milling Co., Inc.*, 84 N. L. R. B. 360, the board held that it would not entertain a charge by a railroad that a union had been guilty of an unfair labor practice in the nature of a secondary boycott, pointing out that L. M. R. A., in (2) and (3) of Title 29, § 152, provides that the term "employer" should not include "any person subject to the Railway Labor Act" and that the term "employee" should not include any indi- [fol. 340] vidual "employed by an employer subject to the Railway Labor Act." When the case came before the Circuit Court of Appeals, *International Rice Milling Co., Inc.* v. *National Labor Relations Board*, 183 Fed. (2d) 21, 25, it was stated that railroads were not excepted from protection under L. M. R. A. from a secondary boycott as defined in said § 158 (b) (4) (A). The board did not seek a review upon this point and consequently the question was not decided on the appeal to the Supreme Court of the United States, *National Labor Relations Board* v. *International Rice Milling Co., Inc.*, 341 U. S. 665, but on remand the board

issued a cease and desist order apparently accepting the position of the Court of Appeals that railroads were employers within § 158 (b) (4) (A). See 95 N. L. R. B. 1420. It is to be noted, however, that the board has expressly declined to follow the broad interpretation made by the Court of Appeals in determining the scope of the exemption set forth in said § 152 (2), (3), although the matter then before the board did not concern a railroad. *Sprys Electric Co.*, 104 N. L. R. B. 1128. See also *Al J. Schneider Co., Inc.*, 87 N. L. R. B. 99; *Texas Electric Bus Lines*, 100 N. L. R. B. 67; *Roy Stone Transfer Corp.*, 100 N. L. R. B. 856. The board seems to have taken the position that, if the party affected is not an employer within said § 152 (2), it will not entertain any charge filed with it. In this situation, until we are more positively directed to the contrary, we doubt that the railroad could obtain a remedy by filing a charge under L. M. R. A. See *Pacific Gamble Robinson Co.* v. *Minneapolis & St. Louis Railway*, 105 Fed. Sup. 794, 804; *Minneapolis & St. Louis Railway* v. *Pacific Gamble Robinson Co.*, 181 Fed. (2d) 812.

[fol. 341] We next inquire whether our courts lack jurisdiction to grant an injunction by reason of U. S. C. (1946 ed.) Title 45, § 151 et seq., the railway labor act. It is the duty of the court to decide its jurisdiction when the question appears on the record even though the point has not been raised by the parties. *Jones* v. *Jones*, 297 Mass. 198. *Blair* v. *Boston Elevated Railway*, 310 Mass. 1. *Couto* v. *Trustees of New York, New Haven & Hartford Railroad*, 312 Mass. 23.

The history and purpose of this act are fully set forth in *General Committee of Adjustment of the Brotherhood of Locomotive Engineers for the Missouri-Kansas-Texas Railroad* v. *Missouri-Kansas-Texas Railroad*, 320 U. S. 323, 328-333, and in *Elgin, Joliet & Eastern Railway* v. *Burley*, 325 U. S. 711, 754-754, *S. C.* 327 U. S. 661, 676-677. What was there said need not be here repeated. The railway labor act applies to disputes between an interstate railroad and its employees arising out of the employer-employee relationship. It sets up nonjudicial processes of conciliation, mediation, and arbitration if negotiation fails for the adjustment of disputes rather than affording immediate recourse to the courts leaving "a minimum responsibility to

the courts." *Order of Railway Conductors of America* v. *Pitney*, 326 U. S. 561, 566. Differences arising out of collective bargaining agreements must be left to the determination of the administrative agency provided by the act and not to the decision of a State court. *Slocum* v. *Delaware, Lackawanna & Western Railroad*, 339 U. S. 239. *Order of Railway Conductors of America* v. *Southern Railway*, 339 U. S. 255. *Brennan* v. *Delaware, Lackawanna & Western Railroad*, 303 N. Y. 411. There are two well established exceptions to the broad jurisdiction conferred upon an ad-[fol. 342] justment board by the act, U. S. C. (1946 ed.) Title 45, §153 (i), to interpret collective bargaining agreements and to settle grievances and disputes arising therefrom: First, an employee instead of seeking relief under the act may bring an action for his wrongful discharge provided his employment has been finally terminated and he is not seeking reinstatement, the determination of his seniority rights, or other benefits, *Moore* v. *Illinois Central Railroad*, 312 U. S. 630; and, second, Federal courts have entertained suits at the instance of an employee where collective bargaining agreements have been challenged as invalid, usually in cases where the agreement is shown to be discriminatory by reason of the color of some of the employees who, unless permitted to maintain a bill in equity to protect their rights, would be without a remedy. *Steele* v. *Louisville & Nashville Railroad*, 323 U. S. 192. *Graham* v. *Brotherhood of Locomotive Firemen & Enginemen*, 338 U. S. 232. *Brotherhood of Railroad Trainmen* v. *Howard*, 343 U. S. 768.

But does the instant suit come within this broad sweep of the railway labor act? Neither the railroad nor New England was a party to any controversy between the union and the motor carriers. There was no dispute between New England and its employees as to wages, hours, or working conditions. It is plain that pressure was brought upon the employees of New England solely for the purpose of preventing the transportation of the trailers by the railroad or, in other words, to compel the railroad to cease doing business with the motor carriers. This was the maintenance of a secondary boycott against the railroad—a weapon long banned in industrial struggles. *New England Cement Gun Co.* v. *McGivern*, 218 Mass. 198, 203.

Cornellier v. *Haverhill Shoe Manufacturers' Association*, 221 Mass. 554, 559. *Harvey* v. *Chapman*, 226 Mass. 191, [fol. 343] 195. *W. A. Snow Iron Works, Inc.* v. *Chadwick*, 227 Mass. 382, 389. *Martineau* v. *Foley*, 231 Mass. 220, 223. *Armstrong Cork & Insulation Co.* v. *Walsh*, 276 Mass. 263, 272. *Reeves* v. *Scott*, 324 Mass. 594, 601.

All parties agree that there was no dispute between the railroad and the union, and the case was presented and tried upon that basis. The union has no concern in the labor policy of the railroad and does not seek to change that policy but is attempting to eliminate or restrict competition by the railroad. The railroad itself has no contract with the union. It has no contract with the motor carriers. It merely accepts the trailers as they are offered for shipment in accordance with its obligations as a common carrier and at the rates established by the interstate commerce commission. A railroad not a participant in a dispute between a union and a shipper has frequently been granted an injunction against striking employees at a plant restraining them from interfering with the movement of freight cars to and from the employer's premises. Likewise, a railroad has been held liable for failure to furnish and remove cars as required by an employer whose employees were conducting a strike against him. *Illinois Central Railroad* v. *International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Union Local* 568, 90 Fed. Sup. 640. *Louisville & Nashville Railroad* v. *Local Union No. 432 of International Woodworkers of America*, 104 Fed. Sup. 748. *Erie Railroad* v. *Local 1286, International Longshoremen's Association*, 117 Fed. Sup. 157. See also *Northwestern Pacific Railroad* v. *Lumber & Sawmill Workers' Union*, 31 Cal. (2d) 441; *Burlington Transportation Co.* v. *Hathaway*, 234 Iowa, 135; *General Drivers, Warehousemen & Helpers, Local Union No. 89* [fol. 344] v. *American Tobacco Co., Inc.*, — Ky. —.[1] There are, however, decisions which do not recognize any absolute duty of the common carrier to receive and transport goods excusable only by acts of God or public enemies but are predicated only upon the duty of the carrier to exercise

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[1] 264 S. W. (2d) 250.

due diligence, as in *Gage* v. *Arkansas Central Railroad*, 160 Ark. 402; *Ritchie* v. *Oregon Short Line Railroad*, 42 Idaho, 193, and *Murphy Hardware Co.* v. *Southern Railway*, 150 N. C. 703, where delays may be excused because of strikes. See *National Labor Relations Board* v. *Rockaway News Supply Co., Inc.*, 345 U. S. 71. The railroad's claim for damages rests principally upon the activity of McCarthy and Norton preventing the hauling of the trailers into the freight yard although in a few instances it seems that trailers had been left in the yard and accepted for shipment by the railroad and had been ordered by them to be removed from the yard. Of course, the railroad could not be held liable for damages from the failure to ship trailers that had not been delivered to it. It appears to us that the gist of the union's complaint is against a method of transportation employed by the motor carriers which none of the collective bargaining agreements with the carriers or New England prohibited but which they impliedly permitted as shown by the circumstances attending the making of these agreements, and that the union had no right to bring pressure upon the railroad through New England to compel the railroad to cease transporting trailers for the motor carriers. See *Opera on Tour, Inc.* v. *Weber*, 285 N. Y. 348, certiorari denied sub nomine *Weber* v. *Opera on Tour, Inc.*, 314 U. S. 615. We do not think in these circumstances that the railway labor act bars the railroad from resorting to the State court for injunctive relief.

[fol. 345] The union seeks to justify its interference with the business of the railroad on the ground that the transportation by rail deprives its members of work which they otherwise would obtain. A union has the right to refuse to work for an employer unless he gives them all of his work which its members are competent to perform, *Pickett* v. *Walsh*, 192 Mass. 57; but it has no right against a third party to compel him to cease doing business wth the employer and thus compel the latter to give all his work to the union. *Reeves* v. *Scott*, 324 Mass. 594. The union could not accomplish such an object against the motor carriers by means of a secondary boycott against New England or the railroad. The burden of showing that its conduct was justified in preventing the loading of the trailers already

in the freight yard and in prohibiting other trailers from entering the freight yard has not been sustained by the union. *Quinton's Market, Inc.* v. *Patterson*, 303 Mass. 315, 317. *Keegan* v. *O'Donnell*, 310 Mass. 346, 349-350. Likewise, the right to picket at the entrance to the plaintiff's freight yard fails when it is utilized as a means of maintaining an unlawful secondary boycott. *Simon* v. *Schwachman*, 301 Mass. 573, 577. *R. H. White Co.* v. *Murphy*, 310 Mass. 510, 522. *Fashioncraft, Inc.* v. *Halpern*, 313 Mass. 385, 391. *Colonial Press Inc.* v. *Ellis*, 321 Mass. 495, 501. *National Labor Relations Board* v. *Denver Building & Construction Trades Council*, 341 U. S. 675. *International Brotherhood of Electrical Workers* v. *National Labor Relations Board*, 341 U. S. 694. *Local 74, United Brotherhood of Carpenters & Joiners of America, A. F. of L.* v. *National Labor Relations Board*, 341 U. S. 707.

The final question on this branch of the case is whether our courts had jurisdiction to grant an injunction. The union contends that this suit comes within G. L. (Ter. Ed.) [fol. 346] c. 149, § 20C, inserted by St. 1935, c. 407, § 1, as amended by St. 1950, c. 452, §§ 1, 2, and further that no injunction could be granted as the conditions precedent prescribed by G. L. (Ter. Ed.) c. 214, § 9A, inserted by St. 1935, c. 407, § 4, as amended by St. 1950, c. 452, § 3, for its issuance were not found by the trial judge.

It is true that the judge found that the suit did not involve a labor dispute as defined by said § 20C, as amended, but it is true that he also found that, if there was a labor dispute, "the union was guilty of an unlawful secondary boycott." We have already said that the finding of the maintenance of a boycott was not plainly wrong and therefore must stand. The finding also complies with the term "unlawful secondary boycott" as defined by said § 20C (f)[1] and is not removed from its sweep because it has also

[1] "The term 'unlawful secondary boycott' means any strike, slowdown, boycott, or concerted cessation of work or withholding of patronage or services, arising out of a labor dispute, where an object thereof is to force or require any person not otherwise engaged in such labor dispute to cease using, selling, handling, transporting, or

been found that the transportation of the trailers for motor carriers who had bargaining agreements with the union was not the greater part of the current business of the railroad and that the loading of the trailers would not have been done by the motor carriers if there had been no dispute between them and the union.

[fol. 347] The trial judge also made the specific findings required by said § 9A, as amended, before entering the final decree. The only contention of the union in this respect is that there was no proof that notice of the suit had been given to "the chief of the police of the city of Boston" by serving him with a copy of the bill of complaint as alleged in the amended bill which averred, and the answer admitted, that there was no violence or breach of the peace. The short answer to this contention is that in the circumstances notice to the head of the police department was not necessary for the entry of the final decree. The point is settled by *Davis Brothers Fisheries Co.* v. *Inc. Pimentel*, 322 Mass. 499, 509.

Damages

A person injured in his business or property by an unlawful secondary boycott may ordinarily bring an action at law for damages. His right to damages, for instance, is not foreclosed by L. M. R. A. for it is there expressly provided that he has such a right to damages sustained by a secondary boycott, U. S. C. (1946 ed.) Sup. V, Title 29, § 185 (b), and it has been held that the enforcement of that right is not dependent on any prior determination of the

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dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; provided, however, that a secondary boycott may lawfully be directed at a person the greater part of whose current business over a representative period is processing, selling, handling, transporting or otherwise dealing in the goods of an employer primarily interested in a lawful labor dispute or who, by any agreement, understanding or arrangement with such employer, is requiring his own employees to perform work or services which would be done by the employees of such employer in the absence of a labor dispute."

national labor relations board. *International Longshoremen's & Warehousemen's Union* v. *Juneau Spruce Corp.* 342 U. S. 237. See *United Construction Workers* v. *Laburnum Construction Corp.* 347 U. S. 656. Even where the right to an injunction is lost, it was said in *Brotherhood of Railroad Trainmen* v. *Toledo, Peoria & Western Railroad,* 321 U. S. 50, 63, that the railroad was not without a remedy for it could bring an action for damages. Where relief by injunction was no longer necessary in a labor controversy, [fol. 348] as in *Quinton's Market, Inc.* v. *Patterson,* 303 315, 321, we remanded the case for the assessment of damages. We merely mention these decisions to illustrate the relationship between the remedy by injunction and the remedy by an award of damages in cases arising out of labor controversies. Where a plaintiff is permitted to seek an injunction he may, as he usually does, also seek damages.

The final decree without any further specification ordered "the respondents" to pay $4,727. This is a class suit in which all the members of the union were represented by the individuals named in the bill. *Thorn* v. *Foy,* 328 Mass. 337, 338; but the union under our law is not a legal entity, *Members of Bakery & Confectionery Workers International Union* v. *Hall Baking Co.* 320 Mass. 286, 291-292, and only those members who participated in or authorized or ratified the wrong complained of should be ordered by name to pay compensation. Liability has been established only as to McCarthy and Norton. *Sweetman* v. *Barrows,* 263 Mass. 349, 355. *Malloy* v. *Carroll,* 287 Mass. 376, 392. *Sullivan* v. *Barrows,* 303 Mass. 197, 204. *Quinton's Market, Inc.* v. *Patterson,* 303 Mass. 315, 320-321.

Conclusion

The interlocutory decrees granting the temporary restraining order and the preliminary injunction must be affirmed in view of the order which we now make affirming the final decree covering such matters. The denial of the motion to disolve the temporary restraining order, the denial of the requests for rulings, and the overruling of the demurrer to the bill subsequently amended and other mis- [fol. 349] cellaneous matters need not be specifically discussed for various reasons. *Boston* v. *Dolan,* 298 Mass.

346, 355-356. *Restighini* v. *Hanagan*, 302 Mass. 151, 154. *Revere* v. *Blaustein*, 315 Mass. 93. *Commonwealth* v. *Gale*, 317 Mass. 274, 277. *Banks* v. *Election Commissioners of Boston*, 327 Mass. 509, 514. The final decree, however, must be modified by striking out the last sentence ordering "the respondents" to pay and substituting therefor a provision ordering McCarthy and Norton to pay the sum of $4,727, together with interest from the date of the filing of the bill and costs of this appeal, and as modified is affirmed.

So ordered.

[fols. 350-362] Reporter of Decisions' Certificate to foregoing paper omitted in printing.

[fols. 363-366] In the Supreme Court of the United States, October Term, 1954

No. 586

Local Union No. 25, et al.,

v.

The New York, New Haven and Hartford Railroad Company

Motion to Amend Record by Filing Final Decree after Rescript

Now come the petitioners and move to amend the record heretofore filed by filing the attached certified copy of the final decree after rescript which was entered by the Superior Court of Massachusetts on March 4, 1955. The Rescript of the Supreme Judicial Court of Massachusetts having been entered on November 17, 1954, the petition for certiorari and the record then available were necessarily filed within ninety days from that date. *Cole* v. *Violette*, 319 U. S. 581. The final decree now sought to be filed, although not then available, is technically the de-

cree which the petition for certiorari requests the Court to review.

John D. O'Reilly, Jr., St. Thomas More Drive, Brighton 35, Massachusetts, Counsel for the petitioners.

[fols. 367-369] Judge's and Clerks' certificates omitted in printing.

[fol. 370] COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss.

Superior Court in Equity

No. 65809—1952

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, Petitioner

v.

LOCAL UNION NO. 25 OF THE INTERNATIONAL BROTHERHOOD OF Teamsters, Chauffeurs, Warehousemen and Helpers of America, and the Following, as Individuals and Representatives of Said Local Union No. 25 of Boston, Massachusetts: Edward F. Jenkins of Boston, President; Michael J. Norton of Boston, Business Agent; and William J. McCarthy of Boston, Business Agent, Respondents

FINAL DECREE AFTER RESCRIPT—March 4, 1955

Pursuant to Rescript herein, it is Ordered, Adjudged and Decreed:

1. The Respondents and their agents, attorneys and counsellors, and each and every one of them are permanently enjoined and shall desist and refrain from interfering with the petitioner's business by inducing, threatening, or hindering any person, company, corporation, firm or association from delivering semi-trailers for transportation on the

Petitioner's flat cars or from entering or leaving the premises of the Petitioner's railroad yard for the said purpose; and from picketing or otherwise patrolling the premises of the Petitioner's railroad yard or in any other way interfering with or preventing the loading or unloading of freight of any kind or nature or description from or to semi-trailers, flat cars, box cars, or other transportation equipment used and employed by the Petitioner; and

[fols. 371-375]

2. It is further Ordered that respondents Michael J. Norton and William J. McCarthy shall pay to the Petitioner the sum of Four Thousand Seven Hundred and Twenty-seven ($4,727.00) Dollars, together with interest from the date of filing of the bill, in the sum of $724.00, plus costs on appeal of $10.00, together with expense of brief, in the amount of $333.00.

Hudson, J., Justice of the Superior Court.

Entered: Mar. 4, 1955.

[fol. 376] SUPREME COURT OF THE UNITED STATES, October Term, 1954

No. 586

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed March 28, 1955

The petition herein for a writ of certiorari to the Superior Court of the Commonwealth of Massachusetts is granted limited to question 1 presented by the petition for the writ which reads as follows:

"1. Does the Labor Management Relations Act oust State courts of jurisdiction of a suit by a railroad to enjoin a union and union representatives from engaging in peaceably conducted strikes or attempts to induce such strikes by the employees of interstate motor carriers for the purpose of persuading such carriers to agree to restrict their use of interstate railroad

transporation facilitres and to give some portion of such interstate carriage work to their employers who are all represented by the union.'"

The case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Harlan took no part in the consideration or decision of this application.

(2607-0)

Office - Supreme Court, U. S.
FILED
FEB 11 1955
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

NO. ~~588~~ 33

LOCAL UNION NO. 25 OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, and the following, as individuals and representatives of said Local Union No. 25 of Boston, Massachusetts: EDWARD F. JENKINS, MICHAEL J. NORTON and WILLIAM J. McCARTHY,

Petitioners,

v.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

Respondent.

Petition for Writ of Certiorari to the Superior Court of the Commonwealth of Massachusetts

JOHN D. O'REILLY, JR.
St. Thomas More Drive
Brighton 35, Massachusetts

Counsel for Petitioners

RICHARD S. SULLIVAN
St. Thomas More Drive
Brighton 35, Massachusetts

STEPHEN J. D'ARCY, JR.
31 State Street
Boston 9, Massachusetts
Of Counsel

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

NO. . . .

LOCAL UNION NO. 25 OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, and the following, as individuals and representatives of said Local Union No. 25 of Boston, Massachusetts: EDWARD F. JENKINS, MICHAEL J. NORTON and WILLIAM J. McCARTHY,

Petitioners,

v.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

Respondent.

Petition for Writ of Certiorari to the Superior Court of the Commonwealth of Massachusetts

---

To the Honorable the Justices of the Supreme Court of the United States:

Petitioners pray that a Writ of Certiorari issue to review the decree of the Superior Court of the Commonwealth of Massachusetts ordered by Rescript of the Supreme Judicial Court of Massachusetts entered November 17, 1954 in the case there entitled *New York, New Haven and Hartford Railroad Company* v. *Edward F. Jenkins and others.*

Opinion Below

An opinion was entered by the Supreme Judicial Court of Massachusetts on November 17, 1954, and is reported in 1954 Massachusetts Advance Sheets 827, 122 N.E. 2d. 759.

Jurisdiction

The Rescript of the Supreme Judicial Court of Massachusetts was entered on November 17, 1954. It ordered a modification of the decree (R. 323) of the Superior Court, and affirmed that decree as modified.[1]

The jurisdiction of this Court is invoked under 28 U.S.C. s. 1257 (3).

The writ is sought to be directed to the Superior Court, and not to the Supreme Judicial Court because, under the Massachusetts Statute[2] and practice, only questions of law are brought before the Supreme Judicial Court, the record and decree remaining in the Superior Court. In this case, in accordance with its usual practice, the Supreme Judicial Court did not remove the record from the Superior Court.

Questions Presented

1. Does the Labor Management Relations Act oust State courts of jurisdiction of a suit by a railroad to enjoin a union and union representatives from engaging in peaceably conducted strikes or attempts to induce such strikes by the employees of interstate motor carriers for the purpose of persuading such carriers to agree to restrict their use of interstate railroad transportation facilities and to give some portion of such interstate carriage work to their employees who are all represented by the union?

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[1] Although the Superior Court has not yet entered a decree pursuant to the Rescript, this application for review to be timely must be filed within ninety days of the date of the Rescript. *Cole* v. *Violette*, 319 U.S. 581. The Rescript is printed, Appendix, post p. 34.

[2] Mass. General Laws (Ter. Ed.) Ch. 211, s. 8.

2. Does the Labor Management Relations Act oust State courts of jurisdiction of a suit by a railroad to enjoin a union and union representatives from peaceably inducing employees of interstate motor carriers, one of which is a subsidiary of the railroad, to refuse to handle and deliver to the railroad trailers prepared for shipment in interstate commerce by railroad, with the purpose of compelling the railroad and its subsidiary to cease doing business with the other motor carriers by handling and transporting such trailers in interstate commerce by railroad, or of compelling the other motor carriers to cease doing business with the railroad by delivering their trailers to the railroad for interstate rail transportation?

Constitutional and Statutory Provisions Involved

The Constitutional provision involved is Article VI, Clause 2:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

The statutory provisions involved are Sections 2 (1), 2 (2), 7, 8 (a) (1), 8 (a) (5), 8 (b) (3), 8 (b) (4) (A), 8 (b) (4) (D), 8 (d) (1), 8 (d) (4), 10 (a) and 10 (1) of the Labor Management Relations Act, 61 Stat. 136, 29 U.S.C. 151 et seq. They are printed in the appendix, post.

Statement of the Case

The respondent Railroad Company is a common carrier by rail, subject to the Interstate Commerce Act and to the Railway Labor Act.[3] Since about 1937, its operations

[3] It is, thus, not an "employer" within the definition of Section 2 (2) of the Labor Management Relations Act, although it may be a "person" within the definition of Section 2 (1).

have included that of hauling on flat cars loaded trailers of the type ordinarily hauled over the highways by motor trucks. This operation is known in the trade and popularly as "piggy-backing." This operation is carried on between Boston and New York, between Providence and New York, between Boston and New Haven, and between Springfield (Massachusetts) and New York, and at times from New Haven to New York. (R. 56).[1]

The petitioner Union is the collective bargaining representative of drivers and helpers employed by motor carriers in the Boston area, and has collective bargaining agreements with motor carriers who operate out of the Boston area. (R. 129). The Union does not represent any of the employees of the respondent Railroad. (R. 130). The individual petitioners are officers and business agents of the petitioner Union who were joined as defendants below.

The process of "piggy-backing" in the Boston area is accomplished by having loaded trailers, owned by the motor carriers, delivered by motor trucks, operated by employees of the carriers, at a freight yard of the respondent. There the trailers are driven, by mechanical devices, by employees of New England Transportation Co. on to specially designed flat cars of the respondent. The trailers are then lashed and secured to the flat cars by employees of the respondent.

New England Transportation Co. is a subsidiary of the respondent. It is a motor carrier, whose employees are members of the petitioner Union, and it has a collective bargaining agreement with the Union similar to the agree-

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[1] The respondent's investment in the equipment for this service is in excess of $3,000,000, and its receipts for the year 1951 were approximately $1,000,000.

ments between the Union and other motor carriers in the Boston area.

For some years the petitioner Union had been disturbed about "piggy-backing," because it felt that the practice diminished the opportunities of its members for employment in over-the-road hauling of trailers between Boston and New Haven and between Boston and New York. During the negotiation of collective bargaining agreements with the motor carriers in 1946, and again in 1949, the Union made formal demands that the carriers cease to ship any trailers by "piggy-back" and carry all their freight over the road. (R. 132, 134, 206, 209). These demands were refused, and the contracts, when made, did not contain agreements in the terms demanded by the Union. (R. 133, 135, 207, 209). After the contracts were made, in 1946, and in 1949, informal discussions and negotiations continued between the Union and the carriers with respect to the discontinuance, by the carriers, of the practice of "piggy-backing," or, in the alternative, a reduction of the volume of "piggy-backing" so as to bring about an increase of the volume of over-the-road trucking. (R. 143, 148-152, 168-169, 212-214, 216-218, 222, 268, 280, 283). These negotiations and discussions were not fruitful.

There were also negotiations and discussions over the issue whether the use, by carriers, of "piggy-backing" constituted violation of the contract provision which restricted the carriers in the leasing of "other equipment" when they have available equipment of their own. (R. 135-137, 173-176, 181).

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[5] The opinion of the Court below (1954 Mass. Adv. Sh. at 830, Appendix, post, p. 22) states: "The New England Transportation Co., a corporation, hereinafter called New England, is a "subsidiary" of the railroad. Nothing more definite of its relationship to the railroad appears." The opinion does not advert to the evidence that New England is a motor carrier (R. 153; 154; 170; 178; 298) nor to the statement in the record (R. 34) that New England is subject to the jurisdiction of the National Labor Relations Board. (See, *New England Transportation Co.*, 1 N.L.R.B. 130).

Petitioners Norton and McCarthy, as business agents of the Union, had been assigned to "cover" that part of the City of Boston which includes Yard 5 of the respondent Railroad, where the respondent receives trailers to be carried in its "piggy-back" operations. On July 11, 12 and 14, 1952, these petitioners, standing near Yard 5,[6] stopped a number of truck-drawn trailers owned by carriers with whom the Union had collective bargaining agreements and bound for Yard 5 to be placed on flat cars for "piggy-back" transportation, and by word and signal persuaded the drivers not to deliver the trailers at Yard 5, but to turn back. (R. 58, 68, 79, 83, 89, 171). They also persuaded the employees of New England Transportation Co. working at Yard 5 not to load the trailers of these carriers on to flat cars for "piggy-back" transportation. (R. 58, 76, 85, 88, 90).[7]

On July 15, 1952, the respondent filed a bill in equity (R. 1) against the petitioners, seeking injunctive relief and damages. The Court, *ex parte* issued a restraining order (R. 6) granting the first two prayers of the bill (R. 5) and forbidding the petitioners to induce, threaten or hinder any person from delivering trailers to the respondent, or to picket or patrol the premises of the respondent "or in any other way to interfere with or prevent the loading or unloading of freight of any kind or nature or description from or to semi-trailers, flat cars, box cars or other transportation equipment used and employed by the plaintiff."

The following day, July 15, 1952, the petitioners moved

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[6] On one occasion, for a brief interval of time, one of the petitioners walked on to the respondent's premises. (R. 113). This technical trespass was not relied upon by counsel in argument, nor was it considered significant by either of the courts below.

[7] There is no evidence in the record nor has there been any assertion of persuasion or coercion addressed to employees of the respondent, nor of any strike activity on their part. The opinion of the Court below (1954 Mass. Adv. Sh. at 835, appendix, post, p. 28) expressly states: "All parties agree that there was no dispute between the railroad and the union."

for dissolution of the temporary restraining order. (R. 6). A hearing on this motion and on the continuance of the restraining order was held and evidence taken on July 24 and 25, 1952. (R. 24-156). On July 30, 1952, the Court "found and ruled" that it had jurisdiction of the case and ordered the injunction continued in force until otherwise ordered. (R. 7). On August 4, 1952, the petitioners moved for modification and amendment of the restraining order and injunction, and on August 8, 1952 this motion was denied. (R. 8).

On August 15, 1952, the trial Court reported to a single justice of the Supreme Judicial Court the material facts (R. 9) upon which it based its denial of the motion to dissolve the preliminary injunction and a report of questions of law (R. 186) including the question, "Does this court have jurisdiction of the action?" On September 30, 1952, after argument, the single justice of the Supreme Judicial Court affirmed the order of the Superior Court, "which is in essence and substance an interlocutory decree of preliminary injunction." (R. 187).

Meanwhile, on July 25, 1952 the Court had allowed (R. 11) a motion for leave to file a substitute bill of complaint (R. 12). Subsequently, on January 15, 1953 the respondent moved (R. 188) to file an amended substitute bill (R. 189) which was allowed on January 23, 1953 (R. 198). On January 26, 1953, the petitioners filed a demurrer and an answer to the amended substitute bill (R. 199). On March 2, 1953, the demurrer was overruled.

The petitioners duly took interlocutory appeals from or exceptions to the various adverse rulings of the Court. (R. 21, 188, 204).

On March 2, 1953 the final hearing was had and further evidence taken (R. 205 - 318) it being stipulated (R. 205) that the evidence taken at the earlier hearing be made a part of the record.

On March 16, 1953 the petitioners filed and the Court denied requests for rulings of law (R. 318), and the Court made a report of material facts and an order for a decree. On March 26, 1953 the Court entered its final decree (R. 323), enjoining the petitioners and awarding damages against them, and on April 14, 1953, the petitioners filed their appeal from the final decree and from the denial of the request for rulings of law. (R. 324). The appeals were heard in the Supreme Judicial Court February 2, 1954, and on November 17, 1954 that Court issued its rescript (Appendix, post, p. 34) affirming the injunctive portion of the decree, and modifying the assessment of damages so that it would run against the petitioners, Norton and McCarthy, instead of against the petitioners generally.

Federal Questions in the Courts Below

1. Throughout the proceedings below, both before the trial court and on appeal, the petitioners contended that their activities were within the protection of Section 7 of the Labor Management Relations Act:

a) In their answer (R. 202) they allege that "all of their activities were in furtherance of their aims in a lawful labor dispute between the * * * Union and various Employers (motor carriers) * * *;" (par. 18); that "* * * all of their activities are within the protection of Sections 7 and 8, subsections (a) (1) and (5) of the National Labor Relations Act * * *;" (par. 20); "* * * that none of their activities were directed at or to [the Railroad] or any of its agents or employees * * *;" (par 21); "* * * that the object of all their activities was to require the various Employers (motor carriers) to perform their collective bargaining agreements and/or to bargain collectively in good faith under the National Labor Relations Act * * *." (par. 22).

b) The same contention was made in support of the demurrer (R. 199) to the bill, which was overruled (R. 204).

c) The same contention was made in the reported argument of counsel at the hearing on the preliminary injunction. (R. 37). The contention was impliedly rejected, when the Court continued the injunction in force. (R. 7).

d) The contention was renewed by brief and oral argument before the Supreme Judicial Court on appeal. That Court did not, so far as is revealed by its opinion, specifically consider the contention. While recognizing (1954 Mass. Adv. Sh. at 828, Appendix, post, p. 20) that, "We can find for ourselves facts in addition to those found by the trial judge and facts contrary to those found by him if we are convinced that his findings are plainly wrong," the Court paid scant attention to the evidence of the discussions and negotiations. (ante, p. 5) between the Union and the carriers in its review of the trial judge's findings (R. 321, 322) that the object of the Union activity was to force the carriers to cease doing business with the Railroad, and to force the Railroad to cease doing business with the carriers. The Court speculated, of these negotiations: "They may have been undertaken by these representatives of the union to alleviate the tension within the union created by members who for some time had been insisting that rail transportation of trailers * * * should be stopped or at least restricted." (1954 Mass. Adv. Sh. at 829, Appendix, post, p. 21). This, notwithstanding the Court's further statement (1954 Mass. Adv. Sh. at 835, Appendix, post, p. 28): "All parties agree that there was no dispute between the railroad and the union, and the case was presented and tried upon that basis." This latter proposition is well documented in the record. (R. 147, 169, 171, 179, 240).

2. The petitioners did not contend, as suggested in the opinion below,[8] that their activity constituted an unlawful secondary boycott. The contention of the petitioners was that the original bill of complaint (R. 4, par. 17) and the

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[8] "The Union upon the facts found urges that it has engaged in a secondary boycott against the railroad in violation of s. 158 (b) (4) (A) of said Title 29." (1954 Mass. Adv. Sh. at 831, Appendix, post, p. 23).

amended substitute bill of complaint (R. 193, par. 12) showed on their face that the subject matter of the complaint was not within the jurisdiction of the State Court, because they set forth statutory unfair labor practices, as to which the Act confers exclusive primary jurisdiction upon the National Labor Relations Board.

a) This contention was made in the requests for rulings (R. 20) submitted after the hearing on the preliminary injunction: "It having been alleged in the complaint that unfair labor practices within the meaning of the National Labor Relations Act have been committed * * * that Act vests the National Labor Relations Board with exclusive primary jurisdiction to determine how much of this peaceful concerted activity shall be prohibited by injunction;" (par. 2); "Said concerted activities are in the field covered by the * * Act, and are therefore preempted and closed to State regulation;" (par. 3); "This Court is without jurisdiction to enjoin said concerted activities and its action in so doing would invade and infringe the exclusive federal field which the * * * Act preempts, and would infringe upon the exclusive jurisdiction of the * * * Board * * *." (par. 4). The Court denied these requests. (R. 21).

b) The same contention was made in counsel's reported argument at the hearing on a preliminary injunction. (R. 25 - 34): "* * * the activities which the plaintiffs seek to proscribe come within the exclusive jurisdiction and purview of * * * the so-called Taft-Hartley Act. * * * The proper forum for presentation of the plaintiff's cause is the National Labor Relations Board. * * * I call the Court's attention to Section 10 (a) of the aforementioned Taft-Hartley Act, which reads as follows: * * *" The Court impliedly rejected the contention by ordering the injunction continued in force. (R. 7).

c) The contention was also made in support of the demurrer (R. 199) to the bill, which was overruled. (R. 204).

d) The contention was made again in requests for rulings after the final hearing. (R. 318-319). These were in substantially the same language as the earlier requests (see (a), above). The Court denied the requests. (R. 320).

e) In brief and oral argument before the Supreme Judicial Court on appeal, the contention was renewed in the light, not only of the allegations of the bill, but also of the findings of the trial judge (R. 321, 322) that the petitioners had caused to occur a concerted cessation of work with the objects of forcing the motor carriers to cease doing business with the respondent and of forcing the respondent to cease doing business with the motor carriers. The Court below, in its opinion,[9] recognized the validity of the contention as an abstract proposition, but it considered no more than tangentially its applicability to the facts of the case.

The opinion inquires whether the respondent Railroad could obtain relief through a charge filed with the National Labor Relations Board, cites a Fifth Circuit decision[10] indicating an affirmative answer to the question, speculates as to the present attitude of the Labor Board and concludes that, "until we are more positively directed to the contrary, we doubt that the railroad could obtain a remedy by filing a charge under L.M.R.A."[11] The opinion then proceeds gratuitously[12] to consider the question whether the Railway Labor Act ousts the State courts of jurisdiction, inquires whether the exclusive primary administrative jur-

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[9] "... a bill of complaint brought for an injunction and based on a violation of s. 158(b)(4) cannot be maintained by the railroad in its own behalf. It is settled that neither a Federal nor a State court has jurisdiction to restrain the commission of an unfair labor practice affecting commerce in proceedings begun in court by the injured party. [Citations]." (1954 Mass. Adv. Sh. at 832, appendix, post, p. 24).

[10] *International Rice Milling Co., Inc.* v. *N.L.R.B.*, 183 F. 2d 21, 25, reversed on other grounds, 341 U.S. 665.

[11] 1954 Mass. Adv. Sh. at 833; Appendix, post, p. 26.

[12] No contentions were raised by either side under the Railway Labor Act.

isdiction established by the Act for railroad labor disputes[13] is applicable or if some exception to that rule is germane, and comes to the conclusion that the Railway Labor Act has nothing to do with the case. Since the Railroad[14] was not a party to any controversy, there is no Railway Labor Act dispute, and the conduct of the petitioners, under the findings of the trial judge,[15] amounts to a secondary boycott, which is unlawful, and under the State law, enjoinable by the State court.

Reasons for Granting the Writ

1. The decision below, being based on the assumption that the respondent Railroad had no standing to file unfair labor practice charges with the National Labor Relations Board, is inconsistent with the decision on that point of the Fifth Circuit in *International Rice Milling Co.* v. *NLRB*, 183 F. 2d. 21, 25; reversed on other grounds, 341 U.S. 665. Furthermore, the Court below, in making that assumption, did so without the "clear showing that respondent has applied to the National Labor Relations Board for appropriate relief, or that it would be futile to do so," required by this Court in *Building Trades Council* v. *Kinard Construction Co.*, 346 U.S. 933.

2. The Court below, in deciding that a State court may have jurisdiction, at the suit of a party without standing to file unfair labor practice charges with the National Labor

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[13] The record is barren of any evidence of involvement of railroad employees.

[14] The opinion, at 1954 Mass. Adv. Sh. 835 (Appendix, post p. 27) seems to suggest an identity of the respondent and New England Transportation Co.: "Neither the railroad nor New England was a party to any controversy between the union and the motor carriers." Compare Note 5, *supra*.

[15] R. 323: "I find that this suit does not involve or grow out of a labor dispute as the term "labor dispute" is defined in Chapter 149 Section 20C of the General Laws (Ter. Ed.). • • •

"If there was a labor dispute I find that the objective and the means used were unlawful and that the union was guilty of an unlawful secondary boycott."

Relations Board (although it would lack jurisdiction at the suit of a party having such standing, and there were in existence parties having such standing[16]) of suits to enjoin conduct which is, actually or colorably, either within the protection of Section 7, or an unfair labor practice under Section 8 (b) (4) (A) of the Labor Management Relations Act, ruled upon a point not reached by this Court in *Garner* v. *Teamsters Union*, 346 U.S. 485, or in any other case, which point is an important one in the interpretation and administration of the Labor Management Relations Act.

3. The questions presented involve serious problems of the sort which have arisen and will continue to arise out of the competition and interaction between Railway Labor Act employers and Taft-Hartley Act employers as they impinge upon employees of the latter with respect to the extent to which Taft-Hartley Act employees are entitled by law to bargain and to exercise sanctions in protection of the continuance of their normal work opportunities. Whether the particular subjects on which these employees seek to bargain, or the methods and means which they would use to further their objectives are within the protection of the National law or are governed by the refinements of the tort law of the several States is a matter of profound national importance. In this light, this case presents[17] the necessity (in the absence of clarifying legislation by the Congress) of this Court giving to the courts of the several States more detailed criteria by which they are

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[16] It is clear on the record that New England would have had standing to charge (whether successfully or not) violation of Section 8 (b) (4) (A), in which case, if the charge were administratively thought to be well founded, application to a federal court for an injunction would have been mandatory under Section 10 (1). It is equally clear that the other motor carriers would have had standing to charge violations of Sections 8(b)(4)(A), 8(b)(4)(D) or (8b)(3) (cf. Sections 8(d)(1), 8(d)(4), *Local No. 3* v. *N.L.R.B.*, 210 F. 2d 325; cert. den. 348 U.S. 822).

[17] Note the disposition of the federal questions presented, *ante*, following Statement of the Case.

to scrutinize and evaluate claims of federal right asserted before them by employees in the name of National law.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN D. O'REILLY, JR.
St. Thomas More Drive
Brighton 35, Massachusetts

Counsel for Petitioners.

RICHARD S. SULLIVAN
St. Thomas More Drive
Brighton 35, Massachusetts

STEPHEN J. D'ARCY, JR.
31 State Street
Boston 9, Massachusetts

Of Counsel

February 10, 1955.

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Appendix A

Opinion of the Supreme Judicial Court of Massachusetts

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY *vs.* EDWARD F. JENKINS & others.

Suffolk. February 2, 1954. — November 17, 1954.

Present: QUA, C.J., LUMMUS, RONAN, WILKINS, & WILLIAMS, JJ.

Labor and Labor Union. Jurisdiction, Labor, Raising question of jurisdiction. *Unlawful Interference. Boycott. Picketing. Equity Jurisdiction,* Damages, Labor. *Equity Pleading and Practice,* Labor case, Injunction, Parties, Damages. *Railroad,* Labor matters, Boycott. *Damages,* For unlawful interference. *Voluntary Association.*

Suit in equity heard on the merits in the Superior Court by *Giles*, J.

RONAN, J. These are appeals from certain interlocutory decrees and from a final decree granting an injunction restraining the three named individual defendants and the other members of Local Union No. 25 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America from inducing or encouraging any person to refuse to load trailers or threatening or hindering any person or company from delivering trailers for transportation upon the plaintiff's flat cars, from entering the plaintiff's freight yard for said purpose, and from picketing the said yard for the purpose of preventing the loading or unloading of said trailers, and awarding damages to the plaintiff.

Upon the filing of the bill a temporary restraining order was issued ex parte and a preliminary injunction was granted after a hearing following the return of the order of notice. A single justice of this court, to whom the propriety of granting the injunction was reported, refused to set aside the injunction. The suit was then heard on the merits in the Superior Court upon oral evidence and, by agreement of the parties, upon a transcript of the evidence

adduced at the hearing upon the return of the order of notice. A final decree followed granting injunctive relief and awarding damages.

The appeal from the final decree is here upon a report of the material facts and a transcript of the evidence, and opens up for our determination questions of law, fact, and discretion. We can find for ourselves facts in addition to those found by the trial judge and facts contrary to those found by him if we are convinced that his findings are plainly wrong. *Trade Mutual Liability Ins. Co.* v. *Peters*, 291 Mass. 79. *Lowell Bar Association* v. *Loeb*, 315 Mass. 176. *291 Washington St. Inc.* v. *School St. Liquors, Inc.* 331 Mass. 150.[1]

We now proceed to summarize briefly the facts.

The plaintiff is a railroad engaged in the carriage of passengers and the transportation of freight between places within and without the Commonwealth. It began in 1937 to transport trailers on flat cars between Boston and points outside the Commonwealth, principally to and from New York city. Trailers to be shipped from Boston were hauled into the plaintiff's Boston freight yard where they were detached from the tractors, left in the freight yard, and loaded upon the flat cars by employees of the New England Transportation Co. The business of transporting trailers to and from New York has steadily increased. The plaintiff has purchased 200 flat cars especially designed for this service and these, together with construction of ramps and other necessary structures, represent an investment of more than $3,000,000. The total receipts from this service in 1951 amounted to about $1,000,000 which was less than one per cent of the total receipts derived by the plaintiff from the operation of its entire system.

Local No. 25 is a voluntary trade association or union,

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[1] Mass. Adv. Sh. (1954) 163. [Footnotes as numbered by the Court].

and the three named individual defendants occupy the offices ascribed to them in the bill and fairly represent the remaining members of the union. The union has about 9,000 members and is comprised of those who are employed as operators or helpers upon trucks or tractors of motor carriers doing business in Boston and engaged in the transportation of goods within and without the Commonwealth. It has collective bargaining agreements with these motor carriers. These carriers transport freight over the road between Boston and New York, but in recent time they have been making more use of the rail service furnished by the plaintiff. The union has viewed with alarm this increased rail service as it deprived its members of work they otherwise would have had of driving the tractors with the trailers over the highways. In recent years drafts of collective bargaining agreements containing provisions restricting the use of rail transportation were submitted to the motor carriers for execution at the expiration of existing agreements, but the carriers refused to sign and the union agreed to the elimination of these provisions. The agreements were then executed. Agreements with the motor carriers in this form were in existence on the three days in July, 1952, hereinafter mentioned. Notwithstanding the attitude of the motor carriers in refusing to assent to a limitation of this rail transportation, representatives of the union conducted oral, collateral, and informal negotiations of uncertain content and doubtful import with some of the motor carriers seeking to restrict the use by the latter of the rail facilities furnished by the railroad. The union properly does not contend that such dealings resulted in any agreement of binding force and effect upon the motor carriers. They may have been undertaken by these representatives of the union to alleviate the tension within the union created by members who for some time had been insisting that rail transportation of trailers, commonly known in the transportation trade as "piggyback trucking," should be stopped or at least restricted. This subject was not included in the

existing bargaining agreements, and we are satisfied that if the union desired a modification of the agreements it did not adopt the course outlined in the agreements to secure a modification. The relations between the motor carriers and the union concerning this mode of transportation had become unsteady and strained, but all parties were seemingly reluctant to force the issue. Finally on the late afternoons of July 11, 12, and 14, 1952, the defendants McCarthy and Norton, business agents of the union, took positions on the street near the entrance to the plaintiff's freight yard, stopped various tractors hauling trailers belonging to motor carriers who had collective bargaining agreements with the union, and ordered them to drive away from the freight yard, which the operators did. Some of the trailers of these motor carriers were already in the freight yard when McCarthy and Norton appeared, and were ready for loading, but they were not loaded because of the orders given by McCarthy and Norton to the employees of New England Transportation Co. These two union representatives were in the freight yard on one of these afternoons for a short period of time carrying out their purpose of preventing the rail transportation of the trailers. Their conduct at no time was disorderly or other than peaceful. Although it did not appear that McCarthy and Norton were acting under any direct or specific instructions from the union, the union seeks to justify their conduct on the ground that they were acting in its behalf in attempting to make more work available for its membership if the rail transportation was prevented or restricted. The motor carriers are not parties to this suit.

The New England Transportation Co., a corporation, hereinafter called New England, is "a subsidiary" of the railroad. Nothing more definite of its relationship to the railroad appears. Trailers are left in the freight yard by the motor carriers and are loaded upon the flat cars by employees of New England and are fastened to the cars by employees of the mechanical department of the railroad. The

reverse process is used on inbound trailers. The employees of New England are members of the union. New England has a collective bargaining agreement with the union, but it has no contract with the motor carriers.

Injunctive Relief

The parties in the present suit from the outset have recognized that the crucial question is the jurisdiction of the Superior Court to grant injunctive relief. Shortly before the bill of complaint was filed in the instant case, the United States District Court had dismissed, after an ex parte hearing, a bill filed by the railroad. The last amendment to the bill filed in the Superior Court was based upon *In re Washington-Oregon Shingle Weavers' District Council*, 101 N. L. R. B. 1159,[1] but we need not analyze that decision as we see nothing in it that tends to support the railroad's contention that the Superior Court had jurisdiction to restrain a violation of the secondary boycott provisions of the national labor relations act, § 8 (b) (4) (A), as amended by the labor management relations act, 1947, U. S. C. (1946 ed.) Sup. V, Title 29, § 158 (b) (4) (A). The railroad has now abandoned that contention but still contends that it is entitled to relief under the statutes and decisions of this Commonwealth.

One of the principal contentions of the union is that the subject matter of this suit comes within the exclusive jurisdiction of the national labor relations act of 1935, U. S. C. (1946 ed.) Title 29, § 151 et seq., as amended by the labor management relations act of 1947, U. S. C. (1946 ed.) Sup. V, Title 29, § 141 et seq., the Taft-Hartley act so called, hereinafter referred to as L. M. R. A. The union upon the facts found urges that it has engaged in a secondary boycott against the railroad in violation of § 158 (b) (4) (A) of said Title 29. The railroad was a neutral employer and so was

[1] See *National Labor Relations Board* v. *Washington-Oregon Shingle Weavers' District Council*, 211 Fed. (2d) 149.

New England. The union argues that L. M. R. A. has preempted the field and that there is no room for the operation of the laws of the Commonwealth to enjoin this secondary boycott. *Bethlehem Steel Co.* v. *New York State Labor Relations Board*, 330 U. S. 767. *La Crosse Telephone Corp.* v. *Wisconsin Employment Relations Board*, 336 U. S. 18. *Plankinton Packing Co.* v. *Wisconsin Employment Relations Board*, 338 U. S. 953. *International Union of United Automobile, etc. Workers of America, C. I. O.* v. *O'Brien*, 339 U. S. 454. *Amalgamated Association of Street, Electric Railway & Motor Coach Employees of America, Division 998* v. *Wisconsin Employment Relations Board*, 340 U. S. 383. *Montgomery Building & Construction Trade Council* v. *Ledbetter Erection Co. Inc.* 260 Ala. 382. *Gerry of California* v. *Superior Court of Los Angeles County*, 32 Cal. (2d) 119. *McNish* v. *American Brass Co.* 139 Conn. 44. *Norris Grain Co.* v. *Seafarers' International Union of North America, A. F. L., Canadian District*, 232 Minn. 91. *Pittsburgh Railways Co. Substation Operators & Maintenance Employees' Case*, 357 Pa. 379. The principle that a State court has no jurisdiction to restrain an unfair labor practice in the nature of a secondary boycott in an industry affecting commerce has recently been affirmed by the Supreme Court of the United States. *Garner* v. *Teamsters, Chauffeurs & Helpers Local Union No. 776 (A. F. L.)*, 346 U. S. 485. *Building Trades Council* v. *Kinard Construction Co.* 346 U. S. 933. *Capital Service, Inc.* v. *National Labor Relations Board*, 347 U. S. 501.

In the next place, a bill of complaint brought for an injunction and based on a violation of § 158 (b) (4) (A) cannot be maintained by a railroad in its own behalf. It is settled that neither a Federal nor a State court has jurisdiction to restrain the commission of an unfair labor practice affecting commerce in proceedings begun in court by the injured party. *Amazon Cotton Mill Co.* v. *Textile Workers Union of America*, 167 Fed. (2d) 183. *Amalga-*

mated Association of Street, Electric Railway & Motor Coach Employees of America v. *Dixie Motor Coach Corp.* 170 Fed. 2d 902. *Schatte* v. *International Alliance of Theatrical Stage Employees & Moving Picture Machine Operators of United States & Canada*, 182 Fed. (2d) 158. *Studio Carpenters Local Union No. 946* v. *Loew's, Inc.* 182 Fed. (2d) 168, certiorari denied 340 U. S. 828.

We are not, however, prepared to agree with the union that the only means open to the railroad to secure injunctive relief was through a charge filed by the railroad with the national labor relations board and by subsequent proceedings by the board. In *International Rice Milling Co. Inc.* 84 N. L. R. B. 360, the board held that it would not entertain a charge by a railroad that a union had been guilty of an unfair labor practice in the nature of a secondary boycott, pointing out that L. M. R. A., in (2) and (3) of Title 29, § 152, provides that the term "employer" should not include "any person subject to the Railway Labor Act" and that the term "employee" should not include any individual "employed by an employer subject to the Railway Labor Act." When the case came before the Circuit Court of Appeals, *International Rice Milling Co. Inc.* v. *National Labor Relations Board*, 183 Fed. (2d) 21, 25, it was stated that railroads were not excepted from protection under L. M. R. A. from a secondary boycott as defined in said § 158 (b) (4) (A). The board did not seek a review upon this point and consequently the question was not decided on the appeal to the Supreme Court of the United States, *National Labor Relations Board* v. *International Rice Milling Co. Inc.* 341 U. S. 665, but on remand the board issued a cease and desist order apparently accepting the position of the Court of Appeals that railroads were employers within § 158 (b) (4) (A). See 95 N. L. R. B. 1420. It is to be noted, however, that the board has expressly declined to follow the broad interpretation made by the Court of Appeals in determining the scope of the exemption set forth in said § 152 (2), (3), although the matter then before the

board did not concern a railroad. *Sprys Electric Co.* 104 N. L. R. B. 1128. See also *Al J. Schneider Co. Inc.* 87 N. L. R. B. 99; *Texas Electric Bus Lines*, 100 N. L. R. B. 67; *Roy Stone Transfer Corp.* 100 N. L. R. B. 856. The board seems to have taken the position that, if the party affected is not an employer within said § 152 (2), it will not entertain any charge filed with it. In this situation, until we are more positively directed to the contrary, we doubt that the railroad could obtain a remedy by filing a charge under L. M. R. A. See *Pacific Gamble Robinson Co.* v. *Minneapolis & St. Louis Railway*, 105 Fed. Sup. 794, 804; *Minneapolis & St. Louis Railway* v. *Pacific Gamble Robinson Co.* 181 Fed. (2d) 812.

We next inquire whether our courts lack jurisdiction to grant an injunction by reason of U. S. C. (1946 ed.) Title 45, § 151 et seq., the railway labor act. It is the duty of the court to decide its jurisdiction when the question appears on the record even though the point has not been raised by the parties. *Jones* v. *Jones*, 297 Mass. 198. *Blair* v. *Boston Elevated Railway*, 310 Mass. 1. *Couto* v. *Trustees of New York, New Haven & Hartford Railroad*, 312 Mass. 23.

The history and purpose of this act are fully set forth in *General Committee of Adjustment of the Brotherhood of Locomotive Engineers for the Missouri-Kansas-Texas Railroad* v. *Missouri-Kansas-Texas Railroad*, 320 U. S. 323, 328-333, and in *Elgin, Joliet & Eastern Railway* v. *Burley*, 325 U. S. 711, 751-754, *S. C.* 327 U. S. 661, 676-677. What was there said need not be here repeated. The railway labor act applies to disputes between an interstate railroad and its employees arising out of the employer-employee relationship. It sets up nonjudicial processes of conciliation, mediation, and arbitration if negotiation fails for the adjustment of disputes rather than affording immediate recourse to the courts leaving "a minimum responsibility to the courts." *Order of Railway Conductors of America* v. *Pitney*, 326 U. S. 561, 566. Differences arising out of col-

lective bargaining agreements must be left to the determination of the administrative agency provided by the act and not to the decision of a State court. *Slocum* v. *Delaware, Lackawanna & Western Railroad*, 339 U. S. 239. *Order of Railway Conductors of America* v. *Southern Railway*, 339 U. S. 255. *Brennan* v. *Delaware, Lackawanna & Western Railroad*, 303 N. Y. 411. There are two well established exceptions to the broad jurisdiction conferred upon an adjustment board by the act, U. S. C. (1946 ed.) Title 45, § 153 (i), to interpret collective bargaining agreements and to settle grievances and disputes arising therefrom: First, an employee instead of seeking relief under the act may bring an action for his wrongful discharge provided his employment has been finally terminated and he is not seeking reinstatement, the determination of his seniority rights, or other benefits, *Moore* v. *Illinois Central Railroad*, 312 U. S. 630; and, second, Federal courts have entertained suits at the instance of an employee where collective bargaining agreements have been challenged as invalid, usually in cases where the agreement is shown to be discriminatory by reason of the color of some of the employees who, unless permitted to maintain a bill in equity to protect their rights, would be without a remedy. *Steele* v. *Louisville & Nashville Railroad*, 323 U. S. 192. *Graham* v. *Brotherhood of Locomotive Firemen & Enginemen*, 338 U. S. 232. *Brotherhood of Railroad Trainmen* v. *Howard*, 343 U. S. 768.

But does the instant suit come within this broad sweep of the railway labor act? Neither the railroad nor New England was a party to any controversy between the union and the motor carriers. There was no dispute between New England and its employees as to wages, hours, or working conditions. It is plain that pressure was brought upon the employees of New England solely for the purpose of preventing the transportation of the trailers by the railroad or, in other words, to compel the railroad to cease doing business with the motor carriers. This was the maintenance

of a secondary boycott against the railroad — a weapon long banned in industrial struggles. *New England Cement Gun Co.* v. *McGivern*, 218 Mass. 198, 203. *Cornellier* v. *Haverhill Shoe Manufacturers' Association*, 221 Mass. 554, 559. *Harvey* v. *Chapman*, 226 Mass. 191, 195. *W. A. Snow Iron Works, Inc.* v. *Chadwick*, 227 Mass. 382, 389. *Martineau* v. *Foley*, 231 Mass. 220, 223. *Armstrong Cork & Insulation Co.* v. *Walsh*, 276 Mass. 263, 272. *Reeves* v. *Scott*, 324 Mass. 594, 601.

All parties agree that there was no dispute between the railroad and the union, and the case was presented and tried upon that basis. The union has no concern in the labor policy of the railroad and does not seek to change that policy but is attempting to eliminate or restrict competition by the railroad. The railroad itself has no contract with the union. It has no contract with the motor carriers. It merely accepts the trailers as they are offered for shipment in accordance with its obligations as a common carrier and at the rates established by the interstate commerce commission. A railroad not a participant in a dispute between a union and a shipper has frequently been granted an injunction against striking employees at a plant restraining them from interfering with the movement of freight cars to and from the employer's premises. Likewise, a railroad has been held liable for failure to furnish and remove cars as required by an employer whose employees were conducting a strike against him. *Illinois Central Railroad* v. *International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Union Local 568*, 90 Fed. Sup. 640. *Louisville & Nashville Railroad* v. *Local Union No. 432 of International Woodworkers of America*, 104, Fed. Sup. 748. *Erie Railroad* v. *Local 1286, International Longshoremen's Association*, 117 Fed. Sup. 157. See also *Northwestern Pacific Railroad* v. *Lumber & Sawmill Workers' Union*, 31 Cal. (2d) 441; *Burlington Transportation Co.* v. *Hathaway*, 234 Iowa, 135; *General Drivers, Warehousemen & Helpers, Local Union No. 89* v. *American*

Tobacco Co. Inc. — Ky. —.[1] There are, however, decisions which do not recognize any absolute duty of the common carrier to receive and transport goods excusable only by acts of God or public enemies but are predicated only upon the duty of the carrier to exercise due diligence, as in *Gage* v. *Arkansas Central Railroad*, 160 Ark. 402, *Ritchie* v. *Oregon Short Line Railroad*, 42 Idaho, 193, and *Murphy Hardware Co.* v. *Southern Railway*, 150 N. C. 703, where delays may be excused because of strikes. See *National Labor Relations Board* v. *Rockaway News Supply Co. Inc.* 345 U. S. 71. The railroad's claim for damages rests principally upon the activity of McCarthy and Norton preventing the hauling of the trailers into the freight yard although in a few instances it seems that trailers had been left in the yard and accepted for shipment by the railroad and had been ordered by them to be removed from the yard. Of course, the railroad could not be held liable for damages from the failure to ship trailers that had not been delivered to it. It appears to us that the gist of the union's complaint is against a method of transportation employed by the motor carriers which none of the collective bargaining agreements with the carriers or New England prohibited but which they impliedly permitted as shown by the circumstances attending the making of these agreements, and that the union had no right to bring pressure upon the railroad through New England to compel the railroad to cease transporting trailers for the motor carriers. See *Opera on Tour, Inc.* v. *Weber*, 285 N. Y. 348, certiorari denied sub nomine *Weber* v. *Opera on Tour, Inc.* 314 U. S. 615. We do not think in these circumstances that the railway labor act bars the railroad from resorting to the State court for injunctive relief.

The union seeks to justify its interference with the business of the railroad on the ground that the transportation by rail deprives its members of work which they otherwise

[1] 264 S. W. (2d) 250.

would obtain. A union has the right to refuse to work for an employer unless he gives them all of his work which its members are competent to perform, *Pickett* v. *Walsh*, 192 Mass. 572; but it has no right against a third party to compel him to cease doing business with the employer and thus compel the latter to give all his work to the union. *Reeves* v. *Scott*, 324 Mass. 594. The union could not accomplish such an object against the motor carriers by means of a secondary boycott against New England or the railroad. The burden of showing that its conduct was justified in preventing the loading of the trailers already in the freight yard and in prohibiting other trailers from entering the freight yard has not been sustained by the union. *Quinton's Market, Inc.* v. *Patterson*, 303 Mass. 315, 317. *Keegan* v. *O'Donnell*, 310 Mass. 346, 349-350. Likewise, the right to picket at the entrance to the plaintiff's freight yard fails when it is utilized as a means of maintaining an unlawful secondary boycott. *Simon* v. *Schwachman*, 301 Mass. 573, 577. *R. H. White Co.* v. *Murphy*, 310 Mass. 510, 522. *Fashioncraft, Inc.* v. *Halpern*, 313 Mass. 385, 391. *Colonial Press Inc.* v. *Ellis*, 321 Mass. 495, 501. *National Labor Relations Board* v. *Denver Building & Construction Trades Council*, 341 U. S. 675. *International Brotherhood of Electrical Workers* v. *National Labor Relations Board*, 341 U. S. 694. *Local 74, United Brotherhood of Carpenters & Joiners of America A. F. of L.* v. *National Labor Relations Board*, 341 U. S. 707.

The final question on this branch of the case is whether our courts had jurisdiction to grant an injunction. The union contends that this suit comes within G. L. (Ter. Ed.) c. 149, § 20C, inserted by St. 1935, c. 407 § 1, as amended by St. 1950, c. 452, § § 1, 2, and further that no injunction could be granted as the conditions precedent prescribed by G. L. (Ter. Ed.) c. 214, § 9A, inserted by St. 1935, c. 407, § 4, as amended by St. 1950, c. 452, § 3, for its issuance were not found by the trial judge.

It is true that the judge found that the suit did not involve a labor dispute as defined by said § 20C, as amended, but it is true that he also found that, if there was a labor dispute, "the union was guilty of an unlawful secondary boycott." We have already said that the finding of the maintenance of a boycott was not plainly wrong and therefore must stand. The finding also complies with the term "unlawful secondary boycott" as defined by said § 20C (f)[1] and is not removed from its sweep because it has also been found that the transportation of the trailers for motor carriers who had bargaining agreements with the union was not the greater part of the current business of the railroad and that the loading of the trailers would not have been done by the motor carriers if there had been no dispute between them and the union.

The trial judge also made the specific findings required by said § 9A, as amended, before entering the final decree. The only contention of the union in this respect is that there was no proof that notice of the suit had been given to "the chief of the police of the city of Boston" by serving him with a copy of the bill of complaint as alleged in the amended bill which averred, and the answer admitted, that there was no violence or breach of the peace. The short answer to this contention is that in the circumstances notice

[1] "The term 'unlawful secondary boycott' means any strike, slowdown, boycott, or concerted cessation of work or withholding of patronage or services, arising out of a labor dispute, where an object thereof is to force or require any person not otherwise engaged in such labor dispute to cease using, selling, handling, transporting, or dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; provided, however, that a secondary boycott may lawfully be directed at a person the greater part of whose current business over a representative period is processing, selling, handling, transporting or otherwise dealing in the goods of an employer primarily interested in a lawful labor dispute or who, by any agreement, understanding or arrangement with such employer, is requiring his own employees to perform work or services which would be done by the employees of such employer in the absence of a labor dispute."

to the head of the police department was not necessary for the entry of the final decree. The point is settled by *Davis Brothers Fisheries Co. Inc.* v. *Pimentel*, 322 Mass. 499, 509.

Damages

A person injured in his business or property by an unlawful secondary boycott may ordinarily bring an action at law for damages. His right to damages, for instance, is not foreclosed by L. M. R. A. for it is there expressly provided that he has such a right to damages sustained by a secondary boycott, U. S. C. (1946 ed.) Sup. V, Title 29, § 185 (b), and it has been held that the enforcement of that right is not dependent on any prior determination of the national labor relations board. *International Longshoremen's & Warehousemen's Union* v. *Juneau Spruce Corp.* 342 U. S. 237. See *United Construction Workers* v. *Laburnum Construction Corp.* 347 U. S. 656. Even where the right to an injunction is lost, it was said in *Brotherhood of Railroad Trainmen* v. *Toledo, Peoria & Western Railroad*, 321 U. S. 50, 63, that the railroad was not without a remedy for it could bring an action for damages. Where relief by injunction was no longer necessary in a labor controversy, as in *Quinton's Market, Inc.* v. *Patterson*, 303 Mass. 315, 321, we remanded the case for the assessment of damages. We merely mention these decisions to illustrate the relationship between the remedy by injunction and the remedy by an award of damages in cases arising out of labor controversies. Where a plaintiff is permitted to seek an injunction he may, as he usually does, also seek damages.

The final decree without any further specification ordered "the respondents" to pay $4,727. This is a class suit in which all the members of the union were represented by the individuals named in the bill, *Thorn* v. *Foy*, 328 Mass. 337, 338; but the union under our law is not a legal entity, *Members of Bakery & Confectionery Workers International Union* v. *Hall Baking Co.* 320 Mass. 286, 291-292, and only those members who participated in or authorized or ratified

the wrong complained of should be ordered by name to pay compensation. Liability has been established only as to McCarthy and Norton. *Sweetman* v. *Barrows*, 263 Mass. 349, 355. *Malloy* v. *Carroll*, 287 Mass. 376, 392. *Sullivan* v. *Barrows*, 303 Mass. 197, 204. *Quinton's Market, Inc.* v. *Patterson*, 303 Mass. 315, 320-321.

Conclusion

The interlocutory decrees granting the temporary restraining order and the preliminary injunction must be affirmed in view of the order which we now make affirming the final decree covering such matters. The denial of the motion to dissolve the temporary restraining order, the denial of the requests for rulings, and the overruling of the demurrer to the bill subsequently amended and other miscellaneous matters need not be specifically discussed for various reasons. *Boston* v. *Dolan*, 298 Mass. 346, 355-356. *Restighini* v. *Hanagan*, 302 Mass. 151, 154. *Revere* v. *Blaustein*, 315 Mass. 93. *Commonwealth* v. *Gale*, 317 Mass. 274, 277. *Banks* v. *Election Commissioners of Boston*, 327 Mass. 509, 514. The final decree, however, must be modified by striking out the last sentence ordering "the respondents" to pay and substituting therefor a provision ordering McCarthy and Norton to pay the sum of $4,727, together with interest from the date of the filing of the bill and costs of this appeal, and as modified is affirmed.

So ordered.

Stephen J. D'Arcy, Jr., for the defendants.

Herbert Burstein, (*Edmund J. Moore & William Q. Keenan* with him,) for the plaintiff.

Appendix B

Rescript of the Supreme Judicial Court of Massachusetts

COMMONWEALTH OF MASSACHUSETTS.
SUPREME JUDICIAL COURT FOR THE COMMONWEALTH,
At Boston, November 17, 1954.

IN THE CASE OF

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY

vs.

EDWARD F. JENKINS & others

pending in the Superior Court for the County of Suffolk

ORDERED, that the clerk of said court in said county make the following entry under said case in the docket of said court; viz:,—

Interlocutory decrees affirmed. Final decree to be modified by striking out the last sentence ordering "the respondents" to pay and substituting therefor a provision ordering William J. McCarthy and Michael J. Norton to pay the sum of $4,727, together with interest from the date of the filing of the bill and costs of this appeal, and as modified is affirmed.

By the Court,
FREDERICK L. QUINLAN, *Clerk.*

November 17, 1954

Appendix C

Sections of the Labor Management Relations Act.

"SEC. 2. When used in this Act—"

"(1) The term 'person' includes one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers.

"(2) The term 'employer' includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

Rights of Employees

"SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

Unfair Labor Practices

"SEC. 8. (a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

• • •

"(5) to refuse to bargain collectively with the repre-

sentatives of his employees, subject to the provisions of section 9 (a).

"(b) It shall be an unfair labor practice for a labor organization or its agents—

"(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9 (a);

"(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person;

* * * * *

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work: *Provided*, That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act;

* * * * *

"(d) For the purpose of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employ-

ment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

> "(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;
>
> * * * * * *
>
> "(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 9 (a), and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer.

Prevention of Unfair Labor Practices

"SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.

"(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other

person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U. S. C., title 28, secs. 723-B, 723-C).

* * * * *

"(1) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (A), (B), or (C) of section 8 (b), the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any district court of the United States (including the District Court of the United States for the District of Columbia) within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: *Provided further*, That no temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable and such temporary restraining order shall be effective for no longer than five days and will become void at the expiration of such period. Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony: *Provided further*, That for the purposes of this subsection district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any

district in which its duly authorized officers or agents are engaged in promoting or protecting the interests of employee members. The service of legal process upon such officer or agent shall constitute service upon the labor organization and make such organization a party to the suit. In situations where such relief is appropriate the procedure specified herein shall apply to charges with respect to section 8 (b) (4) (D).

Appendix D

Final Decree of Massachusetts Superior Court Prior to Rescript.

FINAL DECREE

This cause came on to be further heard at this sitting and was argued by counsel; and thereupon upon consideration thereof it is Ordered, Adjudged, and Decreed:

I. The Respondents and their agents, attorneys and counsellors, and each and every one of them are permanently enjoined and shall desist and refrain from interfering with the petitioner's business by inducing, threatening or hindering any person, company, corporation, firm or association from delivering semi-trailers for transportation on the petitioner's flat cars, or from entering or leaving the premises of the petitioner's railroad yard for the said purposes; and for picketing or otherwise patrolling the premises of the petitioner's railroad yard or in any other way to interfere with or prevent the loading or unloading of freight of any kind or nature or description from or to semi-trailers, flat cars, box cars or other transportation equipment used and employed by the petitioner;

II. And the respondents are further ordered to pay to the petitioner the sum of $4727.00.

By the Court, (Gites, J.)
Mary G. Murphy,
Asst. Clerk

Entered: March 26, 1953.

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 33

LOCAL UNION NO. 25 OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, and the following, as individuals and representatives of said Local Union No. 25 of Boston, Massachusetts: EDWARD F. JENKINS, MICHAEL J. NORTON and WILLIAM J. McCARTHY,

Petitioners,

v.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPERIOR COURT OF THE COMMONWEALTH OF MASSACHUSETTS

BRIEF FOR PETITIONERS

JOHN D. O'REILLY, JR.
St. Thomas More Drive
Brighton 35, Massachusetts
Counsel for Petitioners

RICHARD S. SULLIVAN
St. Thomas More Drive
Brighton 35, Massachusetts

STEPHEN J. D'ARCY, JR.
31 State Street
Boston 9, Massachusetts
Of Counsel

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In the
Supreme Court of the United States

OCTOBER TERM, 1955

No. 33

LOCAL UNION NO. 25 OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, and the following, as individuals and representatives of said Local Union No. 25 of Boston, Massachusetts: EDWARD F. JENKINS, MICHAEL J. NORTON and WILLIAM J. McCARTHY,

Petitioners,

v.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPERIOR COURT OF THE COMMONWEALTH OF MASSACHUSETTS

BRIEF FOR PETITIONERS

Opinion Below

The opinion of the Supreme Judicial Court of Massachusetts entered on November 17, 1954 (R. p. 303) is reported in 1954 Massachusetts Advance Sheets 827 (331 Mass. 720), 122 N.E.2d 759.

Jurisdiction

The jurisdiction of this Court is invoked on the ground that the highest court of Massachusetts in which a decision could be had has affirmed a permanent injunction (R. p. 301) which invades the area of labor relations law preempted and occupied by, and conflicts with, the provisions of the Labor Management Relations Act, 1947 (61 Stat. 136, 29 U.S.C. 141, *et seq.*). The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

The rescript of the Supreme Judicial Court of Massachusetts (R. p. 302) was entered November 17, 1954. It ordered to be modified, and as modified, affirmed a final decree (R. p. 301) of the Superior Court. The Superior Court entered a final decree after rescript (R. p. 317) March 4, 1955. The petition for certiorari was filed February 11, 1955, before the entry of the final decree after rescript, since an application for review, to be timely, must be filed within ninety days of the date of the rescript of the Supreme Judicial Court. *Cole v. Violette*, 319 U.S. 581. The writ of certiorari was granted March 28, 1955 (R. p. 318, 348 U.S. 969).

Constitutional and Statutory Provisions Involved

The pertinent provisions of the Constitution of the United States (Article I, Section 8, and Article VI, Clause 2) and of the Labor Management Relations Act, 1947 (61 Stat. 136, 29 U.S.C. 141, *et seq.*) are set forth in the Appendix, *post*.

Question Presented

Does the Labor Management Relations Act oust State courts of jurisdiction of a suit by a railroad to enjoin a

union and union representatives from engaging in peaceably conducted strikes or attempts to induce such strikes by the employees of interstate motor carriers for the purpose of persuading such carriers to agree to restrict their use of interstate railroad transportation facilities and to give some portion of such interstate carriage work to their employees who are all represented by the union?

Statement of the Case

The respondent Railroad Company is a common carrier by rail, subject to the Interstate Commerce Act and to the Railway Labor Act.[1] Since about 1937, its operations have included that of hauling on flat cars loaded trailers of the type ordinarily hauled over the highways by motor trucks. This operation is known in the trade and popularly as "piggy-backing." This operation is carried on between Boston and New York, between Providence and New York, between Boston and New Haven, between Springfield (Massachusetts) and New York, and at times from New Haven to New York. (R. p. 52).

The petitioner Union is the collective bargaining representative of drivers and helpers employed by motor carriers in the Boston area, and has collective bargaining agreements with motor carriers who operate out of the Boston area. (R. p. 120). The Union does not represent any of the employees of the respondent Railroad. (R. p. 121). The individual petitioners are officers and business agents of the petitioner Union who were joined as defendants below.

The process of "piggy-backing" in the Boston area is accomplished by having loaded trailers, owned by the motor

[1] It is, thus, not an "employer" within the literal definition of Section 2(2) of the Labor Management Relations Act, although it may be a "person" within the definition of Section 2(1).

carriers, delivered by motor trucks, operated by employees of the carriers, at a freight yard of the respondent. There the trailers are driven, by mechanical devices, by employees of New England Transportation Co. on to specially designed flat cars of the respondent. The trailers are then lashed and secured to the flat cars by employees of the respondent, and are carried, by trains of the respondent, to New York and the other points mentioned above.

New England Transportation Co. is a subsidiary of the respondent. It is a motor carrier, whose employees are members of the petitioner Union, and it has a collective bargaining agreement with the Union similar to the agreements between the Union and other motor carriers in the Boston area.[2]

For some years the petitioner Union had been disturbed about "piggy-backing" because it felt that the practice diminished the opportunities of its members for employment in over-the-road hauling of trailers between Boston and New Haven and between Boston and New York. During the negotiation of collective bargaining agreements with the motor carriers in 1946, and again in 1949, the Union made formal demands that the carriers cease to ship any trailers by "piggy-back" and carry all their freight over the road. These demands were refused, and the contracts, when made, did not contain agreements in the terms demanded by the Union. (R. pp. 123-126, 191-193). After the contracts were made, in 1946, and in 1949, informal dis-

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[2] The opinion below (1954 Mass. Adv. Sh. at 830, R. p. 306) states: "The New England Transportation Co., a corporation, hereinafter called New England, is a 'subsidiary' of the railroad. Nothing more definite of its relationship to the railroad appears." The opinion does not advert to the evidence that New England is a motor carrier (R. pp. 143, 144, 159, 166, 277) nor to the statement in the record (R. p. 30) that New England is subject to the jurisdiction of the National Labor Relations Board. (See, *New England Transportation Co.*, 1 NLRB 130).

cussions and negotiations continued between the Union and the carriers with respect to the discontinuance, by the carriers, of the practice of "piggy-backing," or, in the alternative, a reduction of the volume of "piggy-backing" so as to bring about an increase of the volume of over-the-road trucking. (R. pp. 138-143, 157-158, 195-206, 248, 260, 263). These negotiations and discussions did not result in any formal agreement between the Union and the carriers.

There were also negotiations and discussions over the issue whether the use, by carriers, of "piggy-backing" constituted violation of the contract provision which restricted the carriers in the leasing of "other equipment" when they have available equipment of their own. (R. pp. 126-128, 161-165).

Petitioners Norton and McCarthy, as business agents of the Union, had been assigned to "cover" that part of the City of Boston which includes Yard 5 of the respondent Railroad, where the respondent receives trailers to be carried in its "piggy-back" operations. On July 11, 12 and 14, 1952, these petitioners, standing near Yard 5,[3] stopped a number of truck-drawn trailers owned by carriers with whom the Union had collective bargaining agreements and bound for Yard 5 to be placed on flat cars for "piggy-back" transportation, and by word and signal persuaded the drivers not to deliver the trailers at Yard 5, but to turn back. (R. pp. 54, 64, 77, 83, 160). They also persuaded the employees of New England Transportation Co. working at Yard 5 not to load the trailers of these carriers on to flat cars for "piggy-back" transportation. (R. pp. 72, 79, 82, 84).[4]

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[3] On one occasion, for a brief interval of time, one of the petitioners walked on to the respondent's premises. (R. p. 105). This technical trespass was not relied upon by counsel in argument, nor was it considered significant by either of the courts below.

[4] There is no evidence in the record nor has there been any assertion of persuasion or coercion addressed to employees of the respondent,

On July 15, 1952, the respondent filed a bill in equity (R. p. 1) against the petitioners, seeking injunctive relief and damages. The Court, *ex parte*, issued a restraining order (R. p. 5) granting the first two prayers of the bill (R. pp. 4, 5) and forbidding the petitioners to induce, threaten or hinder any person from delivering trailers to the respondent; or to picket or patrol the premises of the respondent "or in any other way to interfere with or prevent the loading or unloading of freight of any kind or nature or description from or to semi-trailers, flat cars, box cars or other transportation equipment used and employed by the plaintiff."

The following day, July 15, 1952, the petitioners moved for dissolution of the temporary restraining order, (R. p. 6). A hearing on this motion and on the continuance of the restraining order was held and evidence taken on July 24 and 25, 1952 (R. pp. 20-170). On July 30, 1952, the Court "found and ruled" that it had jurisdiction of the case and ordered the injunction continued in force until otherwise ordered. (R. p. 6). On August 4, 1952, the petitioners moved for modification and amendment of the restraining order and injunction, and on August 8, 1952 this motion was denied. (R. p. 7).

On August 8, 1952, the trial Court reported to a single justice of the Supreme Judicial Court the material facts (R. p. 7) upon which it based its denial of the motion to dissolve the preliminary injunction and a report of questions of law (R. p. 173) including the question, "Does this court have jurisdiction of the action?" On September 30, 1952, after argument, the single justice of the Supreme Judicial Court affirmed the order of the Superior Court,

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nor of any strike activity on their part. The Court below expressly states (1954 Mass. Adv. Sh. at 835, R. p. 311): "All parties agree that there was no dispute between the railroad and the union."

"which is in essence and substance an interlocutory decree of preliminary injunction." (R. p. 174).

Meanwhile, on July 25, 1952 the Court had allowed (R. p. 10) a motion for leave to file a substitute bill of complaint (R. p. 10). Subsequently, on January 15, 1953 the respondent moved (R. p. 175) to file an amended substitute bill (R. p. 176). This was allowed on January 23, 1953. (R. p. 184). On January 26, 1953, the petitioners filed a demurrer and an answer (R. p. 184) to the amended substitute bill. On March 2, 1953, the demurrer was overruled. (R. p. 188).

The petitioners duly took interlocutory appeals from or exceptions to the various adverse rulings of the Court. (R. pp. 19, 175, 188).

On March 2, 1953 the final hearing was had and further evidence taken (R. pp. 189-296) it being stipulated (R. p. 189) that the evidence taken at the earlier hearing be made a part of the record.

On March 16, 1953 the petitioners filed and the Court denied requests for rulings of law (R. p. 296), and the Court made a report of material facts and an order for a decree. (R. p. 298). On March 26, 1953 the Court entered its final decree (R. p. 301), enjoining the petitioners as in the preliminary injunction and awarding damages against them. On April 14, 1953 the petitioners filed their appeal from the final decree and from the denial of the request for rulings of law. (R. p. 301). The appeals were heard in the Supreme Judicial Court February 2, 1954, and on November 17, 1954 that Court issued its rescript (R. p. 302) affirming the injunctive portion of the decree, and modifying the assessment of damages so that it would run against the petitioners, Norton and McCarthy, instead of against the petitioners generally. The Court also filed an opinion. (R. p. 303). In compliance with the rescript, the Superior Court on March 4, 1955 entered another final decree. (R.

p. 317). This decree is now being reviewed by this Court on the writ of certiorari entered on March 28, 1955 (R. p. 318).

Summary of Argument

I.

The activity of the Union business agents in inducing employees of various motor carriers to refuse to deliver trailers to the Railroad for transportation on flat cars, and the activity of various members of the Union, employees of the motor carriers, in refusing to deliver such trailers for such purpose, were not secondary activities directed against the Railroad. There was no dispute between the Union or any of its members and the Railroad, nor were any attempts made to encourage or induce employees of the Railroad to do or refrain from doing anything. On the contrary, the activity of which the Railroad has complained was primary activity directed against motor carriers (not parties to this suit) with whom the Union had had a long-standing dispute with reference to "piggy-backing," for the purpose of inducing the motor carriers to accede to the Union's desire to have more trailers transported over the road, so as to assure employment to drivers who were members of the Union. *NLRB* v. *International Rice Milling Co.*, 341 U.S. 665, 671; *NLRB* v. *Denver Building & Construction Trades Council*, 341 U.S. 675, 686. This activity of the Union, carried on as it was continuously, for three days until it was enjoined, was "concerted activity for the purpose of collective bargaining or other mutual aid or protection," within the meaning of Section 7 of the Taft-Hartley Act. The activity itself was at all times orderly and peaceable, and the objective of the Union was within the area as to which Congress has guaranteed the right to bargain and engage in other

concerted activities. This is borne out not only by the legislative history of the Taft-Hartley Act, but also by Labor Board and court decisions marking the outlines of the categories of objectives for which organized employees have the right to bargain or bring collective sanctions to bear. In this light, the legality or the illegality of the Union's conduct is not subject to determination by standards contained in state law. *Bus Employees* v. *Wisconsin Board*, 340 U.S. 383, 390; *Automobile Workers* v. *O'Brien*, 339 U.S. 454. This is particularly so where, as here, the complained-of activities are carried on in commerce itself, not merely in a local industry affecting commerce. The Court below, therefore, erred in enjoining the activities in question as an unlawful boycott under Massachusetts law, because that law, however applicable it might otherwise be to the conduct of the petitioners, has been superseded by the inconsistent provisions of Section 7 of the Taft-Hartley Act.

II.

The State Court erred in taking and retaining jurisdiction of this suit because, even if the subject matter were not clearly protected activity within the coverage of Section 7 of the Taft-Hartley Act, that question would be in a reasonably debatable area, and, in the alternative, any claim made against the Union on the facts of this case would be at least colorably within the exclusive primary jurisdiction of the National Labor Relations Board to determine under Section 10 of the Act. In either event, the State Court had no jurisdiction, particularly under a state *labor law*. *Weber* v. *Anheuser Busch, Inc.*, 348 U.S. 468; *Garner* v. *Teamsters Union*, 346 U.S. 485. The successive amendments to the Railroad's bill of complaint show on their face this jurisdictional defect by revealing

that the Railroad's theory of the case was that the Union's activity was, in part, one or more unfair labor practices under Section 8(b) of the Labor Management Relations Act.

It makes no difference under this heading that the plaintiff here is a railroad. The jurisdiction of the Board is exclusive, regardless of distinctions advanced between "public" and "private" rights. *Garner* v. *Teamsters Union*, supra. And see *General Drivers, etc.* v. *American Tobacco Company, Inc.*, 348 U.S. 978. In any event, the Court below was unwarranted in concluding that the Railroad could not raise issues of unfair labor practices before the Board because the Board would not entertain charges filed by a railroad. The authorities cited by the Court do not support this conclusion, and no case has been found in which the Board reached such a result. Consequently, the Railroad's failure to seek relief from the Board brings this case within the doctrine of *Building Trades Council* v. *Kinard Construction Co.*, 346 U.S. 933.

Argument

I. Petitioners' Activities Were Authorized by Section 7 of the Labor Management Relations Act, 1947.

Section 7 of the Labor Management Relations Act recognizes and declares, as did its predecessor, the National Labor Relations Act, the right of employees "to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection * * *". Whether specific collective employee activity constitutes an exercise of the rights thus guaranteed depends principally upon the objective of the activity and the means used to achieve the objective. It is submitted

that on both scores the activity of the petitioners in the present case comes within the protection of the Statute.

The record amply establishes that the objective of the petitioners was to persuade the motor carrier employers to restrict their use of trailer-on-flat-car facilities of the Railroad, and to give at least some portion of such interstate carriage work to their employees, who are all represented by the Union. (R. pp. 138-143, 157-158, 195-206, 248, 260, 263). This, it is submitted, is a proper bargaining objective and subject matter under Section 7.

This Court, the lower federal courts and the Labor Board, in giving concrete meaning to Section 7, have built up a body of precedent which indicates the sort of thing which constitutes a bargainable subject matter within the coverage of Section 7. It would be manifestly impossible to construct a comprehensive catalog of such matters, but it is abundantly clear that the category of bargainable objectives extends far beyond the rudimentary "wages and hours," and reaches well into the area which an older economy would classify as, on the one hand, "employer prerogative," or, on the other, "internal affairs of the union."

Among the subject matters as to which bargaining has been held to be proper, or even compellable are: inclusion of a "management functions" clause in an agreement (*NLRB* v. *American National Ins. Co.*, 343 U.S. 395); the assignment of employees to shifts (*Bus Employees* v. *Wisconsin Board*, 340 U.S. 383); inclusion of a "strike vote" clause in an agreement (*Allis-Chalmers Mfg. Co.* v. *NLRB*, 213 F.2d 374, C.A. 7); change of status from "driver-owner" of trucks to salaried employee (*NLRB* v. *Na-Car Carriers*, 189 F.2d 756, C.A. 3); an employee stock purchase plan (*Richfield Oil Corp.*, 110 NLRB No. 54; 34 LRRM 1658); placement of employees upon relocation of plant (*Brown Truck & Trailer Mfg. Co.*, 106 NLRB 999); em-

ployees manual, subcontracting of work, and working schedules of employees (*Timken Roller Bearing Co.*, 70 NLRB 500). See also, Cox and Dunlop, *Regulation of Collective Bargaining by the National Labor Relations Board*, 63 Harv. L. Rev. 389, 397; Cox, *Federalism in the Law of Labor Relations*, 67 Harv. L. Rev. 1297, 1328.

It is submitted that the objective of gaining a higher ratio of transportation work for over-the-road shipment so as to obtain more widespread employment of Union drivers was of the same generic character as the objectives enumerated above, and was equally for "mutual aid and protection" within the meaning of Section 7.

The bargainable character of the Union's objective was more than abstract theory. In the case of the petitioner Union and the truck operators with whom it had dealings, it was an accomplished fact. Although the operators had not agreed to the union proposal for complete elimination of "piggy-backing" (R. p. 126), there were conferences between union agents and truck operators, after collective bargaining agreements had been made, with respect to the amount of freight which should be shipped over the road, and the amount which might be shipped by railroad flat-car. The witness Rosenberg, manager of the Holland Transportation Company, when called by the Railroad, testified that he had initiated a conference with the Union's business agents before equipping some of his trailers for flat-car transportation and had reached an understanding with them as to the use of available road drivers and equipment before shipping by rail. (R. pp. 247-248). The witness Weiner, operations manager of St. Johnsbury Trucking Company, also called by the Railroad, testified to an understanding he reached with other Union business agents that he would limit his use of rail facilities to "overflow" business, i.e., freight remaining to be shipped after the available drivers had been given work. (R. p. 260). It was

stipulated at the trial that six other representatives of trucking companies who had been subpoenaed by the Railroad would testify to the same effect as had Weiner. (R. p. 268).

The Court below seems to have no quarrel with the legitimacy of the Union's objective as thus stated. The opinion (R. p. 305) describes the conduct of the business agents of the Union which was the basis of the injunction as follows:

> "The relations between the motor carriers and the union concerning this mode of transportation had become unsteady and strained, but all parties were seemingly reluctant to force the issue. Finally on the late afternoons of July 11, 12, and 14, 1952, the defendants McCarthy and Norton, business agents of the union, took positions on the street near the entrance to the plaintiff's freight yard, stopped various tractors hauling trailers belonging to motor carriers who had collective bargaining agreements with the union, and ordered them to drive away from the freight yard, which the operators did. Some of the trailers of these motor carriers were already in the freight yard when McCarthy and Norton appeared, and were ready for loading, but they were not loaded because of the orders given by McCarthy and Norton to the employees of New England Transportation Co. These two union representatives were in the freight yard on one of these afternoons for a short period of time carrying out their purpose of preventing the rail transportation of the trailers. Their conduct at no time was disorderly or other than peaceful. Although it did not appear that McCarthy and Norton were acting under any direct or specific instructions from the union, the union seeks to justify their conduct on the

ground that they were acting in its behalf in attempting to make more work available for its membership if the rail transportation was prevented or restricted. The motor carriers are not parties to this suit."

On these facts, however, the Court concluded that the conduct was tortious because, under Massachusetts law, it constituted a secondary boycott against either the Railroad or its subsidiary *motor carrier*, New England Transportation Company. Said the Court: "* * * the right to picket at the entrance to the plaintiff's freight yard fails when it is utilized as a means of maintaining an unlawful secondary boycott." (R. p. 313). Again, "* * * the union had no right to bring pressure upon the railroad through New England to compel the railroad to cease transporting trailers for the motor carriers." (R. p. 312). Again, "The union could not accomplish such an object against the motor carriers by means of a secondary boycott against New England or the railroad." (R. p. 312).

It is, of course, a commonplace that the content and meaning of state law, once established by a state court of last resort, are beyond review by this Court or any other. What the Court below overlooked was that, before it could properly reach the issue of a secondary boycott under state law, it must dispose of the Union's contention that the conduct in question is within the protection of Section 7 of the Labor Management Relations Act.[5] This the Court below failed to do.

Even if it should be suggested that the State Court's conclusion that the Union's activity constituted a secondary boycott is in the nature of a finding of fact, that would not bar inquiry by this Court into the question whether it is

[5] This contention was adequately and timely made. See Petition for Certiorari, No. 536, October Term, 1954; pp. 8, 9.

not, rather, protected activity under federal law. As Mr. Chief Justice Taft once said:

> "In cases brought to this court from state courts for review, on the ground that a federal right set up in the state court has been wrongly denied, and in which the state court has put its decision on a finding that the asserted federal right has no basis in point of fact or has been waived or lost, this court as an incident of its power to determine whether a federal right has been wrongly denied, may go behind the finding to see whether it is without substantial support. If the rule were otherwise, it almost always would be within the power of a state court practically to prevent a review here." *Truax* v. *Corrigan*, 257 U.S. 312, 324.

It is the contention of the Union that, so far as "secondary boycott" concepts are determinative of the case, its conduct must be appraised by the so-called "secondary boycott" standards of the Taft-Hartley Act, and, if it is not a secondary boycott by those standards, it should be held to be protected activity under Section 7. As this Court said in *Garner* v. *Teamsters Union*, 346 U.S. 485, 499:

> "The detailed prescription of a procedure for restraint of specific types of picketing would seem to imply that other picketing is to be free of other methods and sources of restraint. For the policy of the National Labor Management Relations Act is not to condemn all picketing but only that ascertained by its prescribed processes to fall within its prohibitions. Otherwise, it is implicit in the Act that the public interest is served by freedom of labor to use the weapon of picketing. For a state to infringe on the

area of labor combat designed to be free is quite as much an obstruction of federal policy as if the state were to declare picketing free for purposes or by means which the federal act prohibits." Reiterated in *Weber* v. *Anheuser Busch, Inc.*, 348 U.S. 468, 475.

The work stoppage which the petitioners induced, far from being secondary, was in direct and primary aid of the objective of increasing the volume of over-the-road shipment to make more work available to the Union membership. The stoppage involved only those employees who were represented by the Union and who were directly interested in the work loss occasioned or threatened to them by the practice of "piggy-backing." Trailers of shippers or employers with whom the Union had no contracts were allowed to be shipped by flat car on the days in question (R. p. 159). There was no purpose or attempt to enlist or obtain the sympathetic action of any other employees.

Under standards authoritatively determined to be contained in the Labor Management Relations Act, the conduct of the Union could not be ruled to be a "secondary boycott." The Court below agreed (R. p. 311) that "there was no dispute between the railroad and the union." This, alone, would be practically conclusive that the Union's conduct was not "secondary" by federal standards. See, *NLRB* v. *Denver Building & Construction Trades Council*, 841 U.S. 675, 687; *Electrical Workers* v. *NLRB*, 341 U.S. 694; *Carpenters Union* v. *NLRB*, 341 U.S. 707; *In re Sailors Union of the Pacific and Moore Dry Dock Company*, 92 NLRB 547; *Thurston Motor Lines, Inc.*, 110 NLRB No. 122, 35 LRRM 1112. In these cases Taft-Hartley "secondary boycotts" were found to be involved where work stoppages were induced in order to reach back against a party with whom the union was in dispute, or where there was persuasion of employees of another employer.

Here, not only was there, as the Court found, no dispute between the Union and the Railroad, but the record is barren of any Union inducement or persuasion of employees of the Railroad. Compare, *NLRB* v. *International Rice Milling Co.*, 341 U.S. 665, *Weber* v. *Anheuser Busch, Inc.*, 348 U.S. 468, 478.

In the light of these considerations, it is submitted that the activity of the petitioners was the inducement of a primary work stoppage in aid of bargainable demands. As such, it came within the freedom of concerted activities guaranteed by Section 7, and whatever might be the standards of Massachusetts law with respect to secondary boycotts, they are irrelevant. *Auto Workers* v. *O'Brien*, 339 U.S. 454; *Bus Employees* v. *Wisconsin Board*, 340 U.S. 383; *Garner* v. *Teamsters Union*, 346 U.S. 485; *Weber* v. *Anheuser Busch, Inc.*, 348 U.S. 468.

Nor did the Union's primary activity cease to be such because there was economic loss resulting to the Railroad. As was said by an earlier Massachusetts Court in a classic case, "* * * the fact that the business of a plaintiff is destroyed by the acts of the defendants done in pursuance of their right of competition is not decisive of the illegality of the acts:" *Pickett* v. *Walsh*, 192 Mass. 572, 584-585.

Nor is there merit in the suggestion of the Court below (R. p. 313) amplified by the Respondent in its Brief in Opposition to the Petition for Writ of Certiorari, p. 10, that the locale of the Union's activity made it something other than primary. The Taft-Hartley test as to whether concerted labor activity is primary or secondary is a functional not a mechanical one. *NLRB* v. *International Rice Milling Co.*, 341 U.S. 665. In the circumstances of this case, the activity of the Union had no effect on the Railroad greater in kind or degree than would have been the case if the Union, with the same objective, had induced the drivers not to leave their respective motor carrier

terminals with "piggy-back" loads, and persuaded the employees of New England Transportation Co. not to load delivered trailers, thus preventing the Railroad from transporting the trailers.

Wherever the Union activity took place, whether at the motor terminals or at the railroad freight yard, the economic effect upon the Railroad would have been the same. The significant fact is that neither the Railroad nor its employees were enlisted or conscripted in aid of the only existing dispute, namely, that between the Union and the motor carrier employers. The area of the existing dispute was in no way enlarged by the fact that the Union chose, as a matter of convenience, to induce the truck drivers to turn back at the entrance to the freight yard, rather than to stop at the exits of the various truck terminals. Nor was the inducement of the New England Transportation Co. employees not to load delivered trailers other than a primary strike pressure, since, although New England is a subsidiary of the Railroad, it is a motor carrier employer whose employees were represented by the Union.

The opinion below states (R. p. 310): "Neither the railroad nor New England was a party to any controversy between the union and the motor carriers. There was no dispute between New England and its employees as to wages, hours, or working conditions. It is plain that pressure was brought upon the employees of New England solely for the purpose of preventing the transportation of the trailers by the railroad or, in other words, to compel the railroad to cease doing business with the motor carriers. This was the maintenance of a secondary boycott against the railroad * * *"

Both the premise and the conclusion, it is submitted, are erroneous. New England is in the trucking business (R. p. 143) and, as the Court found in another part of its opinion (R. p. 306) it has a collective bargaining agreement

with the Union. In addition to loading trailers on flat cars at the Railroad's freight yard, it also maintains an over-the-road freight service between Boston and New York. (R. pp. 166-167). Thus, there was as much dispute between New England and its employees as there was between any other trucker in the area and its employees over the extent of the practice of "piggy-backing" freight. The work stoppage by the New England employees was no more secondary than that of the employees of other truckers who refused to deliver trailers at the Railroad yard for flat-car transportation. It was all primary activity calculated to achieve the Union's objective of obtaining from the truckers a larger share of their transportation business for over-the-road drivers.

In cases involving such an issue as is here presented, viz., whether the provisions of the Taft-Hartley Act supersede state laws or oust state courts of jurisdiction of labor disputes, this Court has frequently looked for guidance to the legislative history of that Act. *Allen Bradley Local No. 1111* v. *Wisconsin Board*, 315 U.S. 740, 748, n. 7; *Automobile Workers* v. *O'Brien*, 339 U.S. 454, 458, n. 5; *Bus Employees* v. *Wisconsin Board*, 340 U.S. 383, 392, 393, 395; *International Union* v. *Wisconsin Board*, 336 U.S. 245, 260; *Algoma Plywood & Veneer Co.* v. *Wisconsin Board*, 336 U.S. 301, 307-313; *United Construction Workers* v. *Laburnum Construction Corp.*, 347 U.S. 656, 668. It is submitted that reference to the legislative history here will lend strength to the Union's contention that its conduct falls within the protection of Section 7, and is insulated from the injunctive jurisdiction of state courts.

The initial legislative step towards the enactment of the Labor Management Relations Act, 1947 was the so-called Hartley Bill, H.R. 3020, 80th Congress, 1st Session. This bill, as it passed the House, contained a number of provisions which, had they become law, would have prohibited

the very things which the Massachusetts decree now under review undertakes to prohibit, and would have set up procedural sanctions under which the prohibitions could have been enforced. These provisions of the bill are set forth in the appendix.

Thus the bill, in Section 2(11) would have removed from the area of bargainable disputes or subject matters, a dispute to gain additional work for the employees. Section 2(14) would have made it an "illegal boycott" for employees in concert to refuse to handle or transport articles "by reason of the character of a prior or proposed future handling thereof." Section 7(a) expressly would have limited the right of "concerted activity" to objectives enumerated in Section 2(11), and Section 8(b)(3) would have made it an unfair labor practice to strike for an objective which is not bargainable under Section 2(11). Section 12(a)(3)(A) would have made an "illegal boycott" an "unlawful concerted activity", for which Section 12(b) provided a damage action in the federal courts. Section 12(c) removed the protection of the Norris-LaGuardia Act, and Section 12(d) would have subjected persons engaging in such activities to deprivation of rights under the bill. Section 301 would have subjected those who engage in "unlawful concerted activity" to the antitrust laws, and in this connection, too, would deny them the benefits of the Norris-LaGuardia Act.

It will be seen that these sections of the Hartley Bill, if enacted into law, would have described precisely the things which the petitioners in this case have done. Their objective of obtaining more work from the trucking operators would have been illegal, their refusal to deliver trailers for "piggy backing" would have been an illegal boycott, and the work stoppage in aid of their objective would have been an "unlawful concerted activity", for which they would have been subject to a federal injunction and damage

judgment, guilty of an unfair labor practice and liable to the civil and criminal provisions of the antitrust laws.

After the Hartley Bill passed the House, however, the Senate Committee on Labor and Public Welfare reported out S. 1126 which ultimately, in substance, was passed as a substitute for the Hartley Bill. In conference, the Bill as it passed the Senate was adopted practically in its entirety, both houses accepted the conference report, and what ultimately became the statute was virtually the Senate bill. The Act, in its final form, eliminated all of the provisions of the Hartley Bill enumerated above.

It is submitted that this sketch of legislative history shows clearly that the Congress gave explicit attention to a proposal to exclude conduct such as that of the present petitioners from the protection of Section 7 and to make it subject to the sanctions of the Labor Board in the public interest and the basis of judicial suits by private parties whose interests might be adversely affected. The rejection of the proposal, after consideration by both houses, can lead only to the conclusion that Congress decided that such conduct is of the sort which the national policy set forth in Section 7 classifies as protected.

There is no legitimate room, here, for the argument that the failure of Congress to declare that such conduct is within Section 7 as explicitly as the Hartley Bill declared that it was not, makes the conduct of the petitioners fair game for state regulation. The only instances in which this Court has recognized state jurisdiction as against a claim of federally recognized privilege under Section 7 are those where there has been an express disclaimer by Congress of a purpose to regulate (*Algoma Plywood & Veneer Co.* v. *Wisconsin Board*, 336 U.S. 301), a pattern of violence, where there is naturally the strongest of presumptions that the state police power is left intact (*Allen-Bradley Local No. 1111* v. *Wisconsin Board*, 315 U.S. 740;

United Construction Workers v. *Laburnum Construction Corp.*, 347 U.S. 656), or harrassing tactics unrelated to bargaining proposals, where there is clearly no Section 7 objective (*International Union* v. *Wisconsin Board*, 336 U.S. 245). This Court has shown little disposition to countenance further extension of state police power which impinges upon activities in the field of labor relations as to which there is a claim of federal right, even though it be in the guise of a non-labor law. *Weber* v. *Anheuser Busch, Inc.*, 348 U.S. 468. *A fortiori*, it should frown upon attempts to adjudicate claims of federal right under state *labor laws*. *Garner* v. *Teamsters Union*, 346 U.S. 485.

In *American Federation of Labor* v. *Swing*, 312 U.S. 321, 326, this Court found that under the Fourteenth Amendment, "A state cannot exclude workingmen from peacefully exercising the right of free communication by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him." It is submitted that, similarly, the Commerce Clause will not tolerate a state law which would render nugatory a broad national policy by mechanistic application of local economic concepts related to illegality of purpose and means without realistic regard to the methods and objectives actually present in both the economic and physical circumstances. Thus, this Court was unwilling to question, in the name of the Fourteenth Amendment, the Missouri policy of applying its antitrust laws in the field of labor disputes. *Giboney* v. *Empire Storage & Ice Co.*, 336 U.S. 490. But when that policy was further extended so as to reach labor relations which affect commerce, this Court did not hesitate to express its disapproval. *Weber* v. *Anheuser Busch, Inc.*, 348 U.S. 468.

Finally, under this head, it is important to note that the activities in this field were all in commerce itself, not merely in a local industry affecting commerce. This fact

should be significant in determining the extent to which a state may exercise its police power. While, as noted above, the power of the states to legislate for public safety is extremely broad, there are limitations upon even state power to legislate in the name of public safety. See, e.g., *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761. The limitations are even narrower upon state power to regulate interstate transportation for economic or social reasons. *Buck* v. *Kuykendall*, 267 U.S. 307; *Morgan* v. *Virginia*, 328 U.S. 373. Without raising the question (which would be beyond the scope of the writ of certiorari) whether, in the absence of an Act of Congress, the state court could have issued its injunction in this case, it is submitted that the Court should more readily determine that the Taft-Hartley Act has excluded state action whose impact is felt directly by commerce, than it would where the initial impact is in a field less completely subject to Congressional control.

II. Any Complaint Which Was or Might Have Been Made of the Petitioners' Activities Was Actually or Colorably Within the Jurisdiction of the National Labor Relations Board, so as to Deprive the State Court of Jurisdiction.

There is another reason why the State Court was without jurisdiction so that its decree should be reversed. Without conceding that any of their acts were illegal, the petitioners point out that the case sought to be made out against them was a case of one or more unfair labor practices denounced by the Labor Management Relations Act. The Railroad, in its successive bills of complaint, set forth at least three unfair labor practices as the gravamen of its complaint, and, during the trial it placed in the record evidence calculated to portray the petitioners' activity as

another such practice. It is submitted that, if the petitioners were to be put on trial for such practices, the only proper tribunal to hear and decide the case was the National Labor Relations Board. *Garner* v. *Teamsters Union*, 346 U.S. 485; *Weber* v. *Anheuser Busch, Inc.*, 348 U.S. 468.

1. The Railroad's original bill of complaint alleged (R. pp. 3, 4, Par. 17a, b, d) the ingredients of an unfair labor practice under Section 8(b)(4)(A) without explicitly characterizing them as such. That the gist of the complaint was an alleged violation of this section was made more clear in the substitute bill (R. p. 13, Pars. 9, 10, 11, and R. p. 15, Par. 14c). Any possible doubts on this point were resolved by the recitals in the motion to amend the substitute bill and in the amended substitute bill (the bill upon which the final decree was rendered).

The motion to amend (R. p. 175) contained the following recital:

> "This request is made because on December 19, 1952, a decision of the United States National Labor Relations Board in *In re Washington-Oregon Shingle Weavers District Council, et al.*, Case No. 19-CC-42, 101 NLRB No. 203 (Marysville, Wash.) made available to the petitioner a remedy under Section 8(b)(4)(A) of the National Labor Relations Act for the harm suffered by the petitioner from the facts giving rise to this cause of action.
>
> "In order to obtain this remedy (which this Court concurrently with District Courts of the United States has jurisdiction to afford) the petitioner must replead its case in accordance with request herein made."

The amended substitute bill of complaint (R. p. 176) repeated the cited paragraphs of the substitute bill, and went on to allege (R. p. 180, par. 12d):

"The said acts were intended to and did, in fact, result in an unlawful secondary boycott in violation of the laws of the Commonwealth of Massachusetts, *and of Section 8(b)(4)(A) of the National Labor Relations Act.*" (Emphasis supplied).

2. In addition to the allegations of secondary boycott, the Railroad's substitute bill and its amended substitute bill set forth, as an additional basis of liability, an allegation of an unfair labor practice under Section 8(b)(4)(D) of the Act, this time specifically characterizing it as such. The substitute bill (R. p. 14, par. 12c, see also the same language in the amended substitute bill, R. p. 180, par. 12c) alleges:

"The said acts were and are intended to compel shippers and motor truck carriers to assign work to members of the respondent union and to thereby commit an unfair labor practice *in violation of the National Labor Relations Act.*" (Emphasis supplied.)

3. A third unfair labor practice imputed by the pleadings to the petitioners was a violation of Section 8(b)(1)(A). The substitute bill (R. p. 12, par. 8a, see also the same language in the amended substitute bill, R. p. 178, par. 8a) alleged:

"The petitioner is informed and believes that on July 11 and July 12, 1952, in or about the premises and in the vicinity of the No. 5 Yard, each of the individual respondents and the respondent union coerced, ordered and directed drivers of tractors hauling trailers for transportation via flat car service to refuse to permit the trailers to be loaded upon petitioner's flat cars."

That the purpose of this language in the substitute bill and the amended substitute bill was to place the petitioners' conduct within the proscription of Section 8(b)(4)(A) is made clear by comparing it with that of paragraph 13 of the original bill of complaint (R. p. 3). There it is alleged that coercion was directed by the petitioners against "various motor carriers and shippers of freight" to divert trailers from the railroad. The substitute allegation that coercion was directed against the drivers, rather than against the carriers who employed them, was manifestly designed to make the bill give expression to the pleader's theory that a Taft-Hartley unfair labor practice is a local tort.

4. Finally, the record indicates the existence of a colorable violation of Section 8(b)(3) of the Act. The Union has collective bargaining agreements with motor carriers in the Boston area. (R. p. 120). While such contracts were being negotiated in 1946 and 1949, the Union demanded a clause prohibiting movement by rail flat car while employers have available equipment of their own, but such a clause was never included in a Union-motor carrier contract, including the contract of 1951, which was in effect at the time of the acts complained of. (R. pp. 125, 126). There was no showing that, prior to the work stoppage in question, the Union had served notices pursuant to Section 8(d) of the Act.

The respondent vigorously protests (brief in opposition to petition for writ of certiorari, pp. 11-13), and will undoubtedly continue to do so, that the petitioners' activity did not constitute a Section 8(b)(4)(A) secondary boycott. That may be true, but it does not detract from the fact that the petitioners' activity was presented to the Court below as a Taft-Hartley secondary boycott and other practices within the proscription of Section 8(b). It is perhaps not without significance that this suit was com-

menced in July, 1952 and the trial was completed in March, 1953, long before December 14, 1953, when this Court handed down its decision in *Garner* v. *Teamsters Union*, 346 U.S. 485.

The crucial issue here is, not whether there was or was not a Taft-Hartley secondary boycott or other unfair labor practice, but, as this Court put it in *Garner* (346 U.S. at 489):

> "It is not necessary or appropriate for us to surmise how the National Labor Relations Board might have decided this controversy had petitioners presented it to that body. The power and duty of primary decision lies with the Board, not with us. But it is clear that the Board was vested with power to entertain petitioner's grievance, to issue its own complaint against respondents and, pending final hearing, to seek from the United States District Court an injunction to prevent irreparable injury to petitioners while their case was being considered. [Footnote omitted]. The question then is whether the State, through its courts, may adjudge the same controversy and extend its own form of relief."

Adjudication of questions as to the four unfair-labor-practice provisions adverted to above, in the context of this case, is a matter peculiarly within the competence of the National Labor Relations Board, the designated and authorized supervisor of the National policy set forth in the Act.

First. Section 8(b)(4)(A) is the vehicle by which Congress has expressed its will with respect to "secondary boycotts." See, *NLRB* v. *Denver Building & Construction Trades Council*, 341 U.S. 675, 686. This vehicle is not, however, a detailed code of specific prohibitions. Rather,

it is a declaration of economic policy, cast in general terms which can be given concrete meaning only by a process of case-by-case adjudication. So far as it may be relevant here, the Section forbids a labor organization to strike or induce a strike or concerted refusal by employees to handle any articles or perform any service where an object thereof is to require any employer or other person to cease doing business with any other person. The filing of a charge under the Section would, on the facts of this case, raise a number of difficult problems of statutory interpretation.

At the outset one would be met with the questions whether "an object" of the picketing was to compel any person "to cease doing business" with "any other person." Was the relation between New England Transportation Company and the motor carriers one of "doing business?" How characterize, in this setting, the course of dealing between the Railroad and its subsidiary, New England? The statutory phrase "to cease doing business" may seem to the lay mind the expression of a very simple idea, but experience has shown that it lacks rigid clarity. *Douds* v. *Metropolitan Federation of Architects, etc.*, 75 F. Supp. 672 (S.D.N.Y., 1948). And see *Royal Typewriter Co.*, 111 NLRB No. 57, 35 LRRM 1474.

Again, whether the Railroad would come within the term, "employer," or "any other person" as used in Section 8(b)(4)(A), or within neither or both of these terms is a question which must be addressed primarily to the *expertise* of the National Board. The problem here is not essentially different from that posed in *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 191, where this Court pointed out that interpretation of the word "employee", as used in Section 10(c), was a problem for the Board, in the setting of the particular case, having in mind the over all purposes of the Act as a whole. In a case such as this, the process of interpretation is one of arriving at a delicate adjustment of a complex of

public interest factors under the code of industrial relations which the Congress has established in the Labor Management Relations Act and the Railway Labor Act as well. Resolution of a problem so directly affecting nationally protected public rights cannot be had by a local balancing of private rights, even where the claimant relies upon a not unusual regulatory policy found in the statute book of a particular state. *Garner* v. *Teamsters Union*, 346 U.S. 485, 498; *Weber* v. *Anheuser Busch, Inc.*, 348 U.S. 468, 479. And see, *General Drivers, etc.*, v. *American Tobacco Co.*, 348 U.S. 978, reversing 264 S.W. 2d. 250.

Finally, under this head, one would find the question, who was boycotting whom? Was the Union's activity directed against the Railroad through New England, or was whatever loss the Railroad incurred a secondary consequence of primary activity directed against the motor carriers? The facts here show concerted action, quite unlike the single isolated incident which this Court appraised in *NLRB* v. *International Rice Milling Co.*, 341 U.S. 665. But both this Court and the Board have pointed out that application of Section 8(b)(4)(A) calls for a delicate judgment as to whether the activity involved is essentially primary or secondary in character. *NLRB* v. *Denver Building & Construction Trades Council*, 341 U.S. 675; *Electrical Workers* v. *NLRB*, 341 U.S. 694; *Carpenters Union* v. *NLRB*, 341 U.S. 707; *NLRB* v. *International Rice Milling Co.*, supra; *Thurston Motor Lines, Inc.*, 110 NLRB No. 122, 35 LRRM 1112; *Brewery & Beverage Drivers, etc., and Washington Coca-Cola Bottling Works*, 107 NLRB 104; *In the Matter of Sailors Union of the Pacific and Moore Dry Dock Co.*, 92 NLRB 547; *In the Matter of International Brotherhood of Teamsters, etc., and Sterling Beverages, Inc.*, 90 NLRB 401. Compare, *Washington-Oregon Shingle Weavers District Council*, 101 NLRB 1159; *NLRB* v. *Washington-Oregon Shingle Weavers District Council*, 211 F.2d 149.

In a very real sense, this case amounts to much more than a lawsuit between the New Haven Railroad and a single local union. The railroad practice of "piggy-backing" is constantly expanding. From a rudimentary, and perhaps freakish beginning of hauling loaded produce wagons short distances a century ago, it is developing, in this decade of the twentieth century, into a substantial segment of the transportation industry. See *Movement of Highway Trailers by Rail*, 293 ICC 93. As additional railroads adopt this practice and develop additional routes, increasing pressures will be brought upon motor carriers to "sell" them this method of transportation as a substitute for over-the-road hauling. Wherever "piggy-back" terminals service an area, the truck drivers will be exposed to competition for their jobs. If, in bringing counter-pressures against the employer motor carriers to retain their jobs, they are subject to limitations growing out of Section 8(b)(4)(A), it is of the highest importance that the nature and content of such limitations be defined by the single standard administered by a single agency. It was hardly the intention of Congress that the bargaining rights of truck drivers for their jobs should have one scope in Boston, another in Chicago, and a third in Philadelphia. Congress has undertaken to regulate the bargaining relationship between drivers and motor carriers, and has entrusted superintendence of that status to the National Board. There has been left no room for parallel or dissident local regulation. See, *Weber* v. *Anheuser Busch, Inc.*, 348 U.S. 468, 479.

Second. Section 8(b)(4)(D) prohibits work stoppages with the objective of "forcing or requiring any employer to assign particular work to employees in a particular labor organization * * * rather than to employees in another labor organization or in another trade, craft or class * * *." A charge under this section would raise problems no less difficult than those which would be raised by a charge under

Section 8(b)(4)(A). Was this a case of "assignment" of work? If so, was it "particular work" within the meaning of the statute? Was there pressure for work assignments which would be discriminatory against New England employees in favor of other members of the Union? If so, would it fall within the prohibition of the Section? Would employees of the Railroad be employees "in another labor organization" within the meaning of the Act? If so would they be deprived of assignment of "particular work?" These questions, like those potentially arising under Section 8(b)(4)(A), call for processes of interpretation calculated to achieve the purposes of the Act considered as a whole, and again, in the nature of things, they should be resolved on a national, not a local level. That the area encompassed by Section 8(b)(4)(D) has been federally pre-empted is underscored by the fact that Congress has seen fit to make special procedural provisions provisions governing Board action in cases of charges based upon this section. See Section 10(k) of the Act.

Third, A similar jurisdictional conflict is suggested by the Railroad's allegations based upon Section 8(b)(1)(A). It is, of course, true that this Court has ruled that this section does not preclude a local common-law damage action where the coercive tactics directed against employees are part of a pattern of violent organizational effort. *United Construction Workers* v. *Laburnum Construction Corp.*, 347 U.S. 656. But this Court has also permitted state action by way of administrative *restraint* where the tactics were, although apparently free of physical violence, harassingly coercive and, in the particular circumstances, unrelated to bargaining objectives. *International Union* v. *Wisconsin Board*, 336 U.S. 245. In *Laburnum*, this Court, by its grant of limited certiorari, clearly pointed out that it was dealing with a special situation, not generally with the question of

jurisdiction of conduct which is prescribed by Section 8(b)(1)(A):

> "*In view of the type of conduct found by the Supreme Court of Appeals of Virginia to have been carried out by Petitioners*, does the National Labor Relations Board have exclusive jurisdiction over the subject matter so as to preclude the State Court from hearing and determining the issues in a common-law tort action based upon this conduct?" 346 N.S. 936. (Emphasis supplied).

In its opinion on the merits, the Court took pains to say, "We are concerned only with the above-stated jurisdictional question." 347 U.S. 656, 659.

The record here shows no pattern of conduct on the part of the petitioners even remotely comparable with that in *Laburnum*. Yet the allegations in the pleadings (which were not borne out by the evidence under any conceivable theory) potentially contained nice questions of statutory interpretation impinging upon an important area in the field of industrial relations regulated, in part, by Section 8(b)(1)(A). The allegations would call upon the trier of the case to make a distinction between restraint or coercion, on the one hand, and persuasion or union discipline, on the other. Thus, again, on its face the bill of complaint is one which commended itself to the attention of the Labor Board, not that of a state court.

Fourth. An examination of the record in its relation to Section 8(b)(3) and 8(d) of the Act further points up the State Court's lack of jurisdiction. Section 8(b)(3) would impose upon the Union the obligation to bargain collectively with employers of employees whom it represents. That term is defined in Section 8(d), which imposes limitations upon the parties to an agreement with respect to modification

and termination. The record indicates that the petitioner Union's contracts with motor carriers contained no express restrictions on the latters' use of the respondent's "piggy-back" service. It also indicates, at least inferentially[6] that this had been the subject of a bargaining proposal in the negotiation of the agreement.

In circumstances like this, Board policy has varied and is none too clear. Compare *Allied Mills, Inc.*, 82 NLRB 854, and *Tide Water Associated Oil Co.*, 85 NLRB 1096, with *Jacobs Manufacturing Co.*, 94 NLRB 1214. In *Jacobs*, a majority of the Board members concurred in the result that a matter which was consciously explored during collective bargaining negotiations was not a mandatory subject of bargaining during the contract period. Not all of the majority members agreed on the reasons for this conclusion, and the Second Circuit, in reviewing the decision of the Board, expressly disclaimed a ruling "upon the effect, if any, on the duty to bargain, of mere previous discussion of a subject without putting any terms and conditions as to it into the contract." *NLRB* v. *Jacobs Manufacturing Co.*, 196 F.2d 680,

Furthermore, although some Board members felt, in *Jacobs*, that, "The portion of Section 8(d) we are here considering does no more than provide a defense to a charge of a refusal to bargain under Section 8(a)(5) or 8(b)(3) of the Act. It does not render unlawful economic action aimed at securing lawful objectives", subsequent judicial decisions have raised serious question as to the right to strike in circumstances such as these described. The Eighth Circuit has read the provisions of the Section 8(d) definition of collec-

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[6] The actual evidence is that negotiations as to "piggy-backing" were had prior to the union-carrier contracts in 1946 and 1949. There is no express evidence as to the negotiations for the 1951 contract, but the impression is left that they were similar to those in 1946 and 1949. (R. p. 126).

tive bargaining as literally precluding a work stoppage during the contract period. *Local No. 3, Packinghouse Workers v. NLRB*, 210 F.2d. 325; *Lion Oil Co. v. NLRB*, 221 F.2d. 231.

The logical implication of a doctrine such as that announced in the latter two cases is that a work stoppage for an objective bargained for but not provided for in a contract, during the period of a contract is an unfair labor practice under Section 8(b)(3). If this be so, certainly cases arising on complaints of such conduct must be brought before the Board. Industrial stability is certainly not to be achieved by allowing individual state courts to rule, as matters of law, or juries to find, as matters of fact, what amounts to "conscious exploration" of a topic that was mentioned at a bargaining conference.

Fifth. Even if adjudication of the case were within the competence of the State Court, it will be noted that the record is completely wanting in data necessary to make a decision on any of the points heretofore discussed so as to interpret and apply the Act for the effectuation of the national policy which it declares. There is no showing as to the extent and relative importance of "piggy-backing" in the railroad industry, nor as to how much impact it is likely to have upon employment in the trucking industry. There is nothing in the record as to the motivations of motor carriers in using rail rather than over-the-road transportation, as to whether they find it economically advantageous or use it as a form of pressure in labor relations. There is nothing, beyond a vague reference to tariff schedules (R. p. 270) to indicate in any detail the nature of the carriage arrangements between the Railroad and motor carriers. There is not even a showing of the part played by New England Transportation Co. in the "piggy-back" operation, except the evidence that its employees place trailers on flat cars.

In a word, the record here contained only such data as

would have enabled the Court below to decide the case if there were no relevant federal statute on the books. It is a record designed to enable a tribunal to choose between two conflicting claims of private right. It is considerably less than the sort of record which would be presented by a General Counsel of the National Labor Relations Board, intent on convincing the Board that the national public policy envisioned by Congress lies on one side or the other of the dispute.

III. The Jurisdiction of the Board is not Affected by the Fact That Respondent is a Rail Carrier.

The Supreme Judicial Court which, unlike the Superior Court, heard and decided this case after the decision in *Garner* v. *Teamsters Union*, 346 U.S. 485, was announced, recognized (R. pp. 307, 308) the impropriety of restraining a Taft-Hartley unfair labor practice as such. It said, however (R. p. 308):

> "We are not, however, prepared to agree with the union that the only means open to the railroad to secure injunctive relief was through a charge filed by the railroad with the national labor relations board and by subsequent proceedings by the board."

The Court went on (R. p. 309) to express its "doubt that the railroad could obtain a remedy by filing a charge under L.M.R.A." From this point it concluded, on the unexpressed assumption that state law was applicable, and without exploring the Union's claim of a Taft-Hartley Section 7 right, that the petitioners had engaged in a Massachusetts secondary boycott, and so it affirmed the decree of the trial court.

The pertinence of the Court's assertion that the Railroad

could not find a remedy with the Board is doubtful, if the petitioners' conduct is within the protection of Section 7 or if it is within the pre-empted area covered by Section 8(b). The soundness of the assertion is even more doubtful.

The Court's assertion is based upon the premise that the Board will not receive charges filed by an employer subject, as is the respondent, to the Railway Labor Act. This extraordinary premise is said to be established by a number of Board decisions applying the definitions of "person" and "employer" contained in Sections 2(1) and 2(2) of the Act. *None of the Board decisions stands for any such proposition as that advanced by the Court. In fact, none of them involved the filing of charges by a rail carrier, and no Board case has been found in which the Board found jurisdictional or other objections to the filing of charges by a rail carrier.*

International Rice Milling Co., Inc., 84 NLRB 360, cited by the Court (R. p. 308) was a case where the complaint was issued on charges filed by the Milling Company, not by a railroad. It involved, not the procedural question of standing to file charges, but the substantive issue whether the inducing of a work stoppage by employees of a rail carrier which stood in a secondary position constituted a violation of Section 8(b)(4)(A). The Board answered that question in the negative, on the ground that the rail carrier was not "another employer" within the meaning of Section 8(b)(4)(A) because rail carriers were expressly excluded from the definition of "employer" in Section 2(2). Thus, this part of the Board's decision, even if it had been allowed to stand,[7] would in no way be inconsistent with

[7] The Court of Appeals reversed, interpreting "employer" in Section 8(b)(4)(A) as including railroads, even though they were expressly excluded from the definition of that word for other purposes. 183 F.2d 21. This question in the case was not reviewed by this Court in 341 U.S. 665.

Board recognition of a rail carrier's standing to file charges.

The Act contains no provision as to who may file charges. The Board must have charges before it in order to issue a complaint, but the statutory reference to charges is in the passive voice: "whenever it is charged * * * ." (Section 10(b)). The Rules and Regulations of the Board (29 C.F.R., Supp. 102.9, 16 F.R. 1937, March 1, 1951) provide:

> "A charge that any person has engaged in or is engaging in any unfair labor practice affecting commerce may be made by any person * * * ."

The Regulations go on to provide that terms used therein, including "person" shall have the meaning given them by Section 2 of the Act.

Section 2(1) of the Act defines "person" as follows:

> "The term 'person' includes one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers."

Thus, on a literal reading of the Board regulations, the Railroad, as a corporation, is a "person" qualified to file a charge of any unfair labor practice. The Board has not decided that its regulations, in this respect, are subject to anything other than a literal reading.

Cases like *Sprys Electric Co.*, 104 NLRB 1128, and its leading predecessor, *Al J. Schneider Co., Inc.*, 87 NLRB 99, relied upon (R. p. 309) by the Court below, are not in point. In the first place, what the Board was passing upon in these cases was the question whether there had been a substantive violation of Section 8(b)(4)(A), not the procedural question of standing to file a charge. In the second place, the cases involved the United States and a political subdivision

of a State. These, like a railroad, are excluded from the statutory definition of "employer" by the express language of Section 2(2), but, unlike railroads ("corporations") they are not included within the definition of "person" in Section 2(1).

As the Court below noted (R. p. 309) the Board, in *International Rice Milling Co., Inc.* acceded to the ruling of the Court of Appeals in that case that a railroad was an "employer" for purposes of Section 8(b)(4)(A) by entering a supplemental order. 95 NLRB 1420. But even if, as the Court intimates (R. p. 309) the Board would not follow that rule in another case involving a railroad, such a Board attitude would not be dispositive of a case like the present. If an 8(b)(4)(A) violation is to be found here, it must be, not on the theory that the Railroad is an employer, for there was no inducement of Railroad employees to strike or take other concerted action, but on the theory that the Railroad was "any other person," within the meaning of the Section.

The fact of the matter is that there is no apparent disposition of the Board to resist the Court of Appeals ruling in *International Rice Milling Co., Inc.* v. *NLRB*, 183 F.2d. 21, that a railroad is an "employer" for purposes of Section 8(b)(4)(A). On the contrary, although the point has not been definitely settled, there is now a disposition, expressed by at least one member of the Board, to go beyond the ruling of the Court of Appeals and to hold that even the United States, States and their political subdivisions are both "employers" and "persons" for purposes of Section 8(b)(4)(A), thus overruling *Sprys Electric Co., Inc.*, 104 NLRB 1128, and its progenitors. See, *Pasco-Kennewick Building Trades Council*, 111 NLRB No. 192, 35 LRRM 1667.

Furthermore, debate and discussion as to whether the Railroad is an "employer" or a "person" for purposes of Section 8(b)(4)(A) would seem highly irrelevant to the question of the Railroad's status to seek administrative

relief as a claimed beneficiary of the public right proclaimed by the other provisions of Section 8(b) which the petitioners' activity is asserted to have violated.

This case is unlike cases where the activity in question was not governed by the national law in that the Board "is without express power to prevent it." *Garner* v. *Teamsters Union*, 346 U.S. 485, 488. See, *International Union* v. *Wisconsin Board*, 336 U.S. 245; *Algoma Plywood Co.* v. *Wisconsin Board*, 336 U.S. 301. Here, the Board could have taken jurisdiction upon the filing of charges by any of the motor carriers, including the Railroad's subsidiary, New England. It would be unthinkable that jurisdiction of activity clearly within its jurisdiction could be wrested from the Board simply by selection of a complaining party.

In any event, even if the Railroad (assuming its allegations to be well founded) should be unable to obtain a remedial order from the Board, whether for want of qualification to file charges or for any one of a number of other reasons which might be listed, it would not follow that the State Court acquires jurisdiction of the case. This Court has emphatically recognized that a failure or refusal of the National Labor Relations Board to act, in a matter within its jurisdiction, may be an integral part of the national scheme which precludes state regulation. *Bethlehem Steel Co.* v. *New York Board*, 330 U.S. 767. As part of this doctrine this Court has required as a minimum that an application to the Board be made where the matter involved is potentially within its jurisdiction. *Building Trades Council* v. *Kinard Construction Co.*, 346 U.S. 933. Since the Railroad admittedly did not file charges with the Board, and since, as has been pointed out there is no "clear showing" that it "would be futile to do so," this case falls clearly within the doctrine of *Kinard*.

IV. The Question of the Damages Portion of the Decree.

In addition to issuing an injunction, the Court below ordered payment of damages. (R. p. 318). It is submitted that this portion of the decree is as invalid as the injunctive paragraph.

As has been pointed out, this case is in no way comparable with *United Construction Workers v. Laburnum Construction Co.*, 347 U.S. 656, where this Court affirmed a money judgment by a state court based upon conduct which came within the description of an unfair labor practice defined by Section 8(b)(1)(A) of the federal Act. The decision there was clearly not an *open sesame* to state courts to accomplish by money judgments what they were forbidden to do by their injunctive processes. *Laburnum*, as indicated by the order granting certiorari (346 U.S. 936) and by the express recital in the opinion (347 U.S. at 659), was limited to the peculiar factual situation there found. The doctrine there established was made applicable to a situation involving, in the words of Senator Taft cited by the Court (347 U.S. at 668) "a threat of violence constituting violation of the law of the State."

Here, it has been expressly found (R. p. 306) that the petitioners' "conduct at no time was disorderly or other than peaceful."

In *Laburnum*, the conduct was tortious by any standard, involving as it did, actual and threatened violent breaches of the peace. Here, to say that the State Court had jurisdiction to award damages for tortious conduct would be to beg the question. If the tortious or privileged character of the petitioners' conduct is to be determined under national law by a national tribunal, it follows that a state court can no more award damages under state law than it can enjoin under that law.

Finally, the National Board, if it had jurisdiction of the activity complained of in this case, was not impotent to

provide an adequate remedy. It had full power, in the event of issuance of a complaint and a finding against the petitioners, to issue whatever order might be appropriate in the circumstances. Section 10(c). In addition, upon issuance of a complaint, the Board could obtain injunctive relief from the United States District Court (Section 10(j)) and, in cases of charges under Sections 8(b)(4)(A) and 8(b)(4)(D) the regional director or regional attorney shall, upon a finding of probable cause, apply to the United States District Court for injunction or temporary restraining order.

It is submitted that, in the circumstances of this case, the Railroad would have been adequately protected by the procedures of, and available to the Board, until an authoritative determination had been made, by a competent tribunal, of the lawful or unlawful character of the petitioners' conduct. Not until such a determination is so made should the Railroad be permitted to seek damages.

Conclusion

For the foregoing reasons it is respectfully requested that this Court reverse the decree of the Massachusetts Superior Court and remand with directions to vacate the decree and dismiss the respondent's bill of complaint.

Respectfully submitted,

JOHN D. O'REILLY, JR.
St. Thomas More Drive
Brighton 35, Massachusetts
Counsel for Petitioners

RICHARD S. SULLIVAN
St. Thomas More Drive
Brighton 35, Massachusetts

STEPHEN J. D'ARCY, JR.
31 State Street
Boston 9, Massachusetts
Of Counsel

Appendix

The pertinent provisions of the Constitution of the United States are as follows:

"ARTICLE I.

"Section 8. The Congress shall have power * * *

"To regulate Commerce with foreign nations, and among the several states and with the Indian Tribes;

* * *

ARTICLE VI.

"The Constitution, and Laws of the United States which shall be made in pursuance thereof, and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the Contrary notwithstanding."

The relevant provisions of the Labor Management Relations Act, 1947 (61 Stat. 136, 29 U.S.C., 141, et seq.), are as follows:

"DEFINITIONS

"Sec. 2. When used in this Act—

"(1) The term 'person' includes one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers.

"(2) The term 'employer' includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Re-

serve Bank, or any State or political subdivision thereof, or any corporation or association operating a hospital if no part of the net earnings inures to the benefit of any private shareholder or individual, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

* * *

"RIGHTS OF EMPLOYEES

"SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

* * *

"UNFAIR LABOR PRACTICES

"SEC. 8. * * *

* * *

"(b) It shall be an unfair labor practice for a labor organization or its agents—

"(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; * * *

* * *

"(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9 (a);

"(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; (B) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9; (C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9; (D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

Provided, That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act;

* * *

"(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

"(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

"(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

"(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

"(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 9 (a), and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period; if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer.

* * *

"PREVENTION OF UNFAIR LABOR PRACTICES

"Sec. 10 (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.

"(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in

which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U.S.C., title 28, secs. 723-B, 723-C). . . .

"(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: *Provided*, That where an order directs reinstatement of an employee,

back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: *And provided further*, That in determining whether a complaint shall issue alleging a violation of section 8 (a) (1) or section 8 (a) (2), and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

* * *

"(j) The Board shall have power, upon issuance of

a complaint as provided in subsection (b) charging that any person has engaged in or is engaging in an unfair labor practice, to petition any district court of the United States (including the District Court of the United States for the District of Columbia), within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

"(k) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (D) of section 8 (b), the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

"(l) Whenever it is charged that any person has engaged in an unfair labor practice, within the meaning of paragraph (4) (A), (B), or (C) of section 8 (b), the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is

true and that a complaint should issue, he shall, on behalf of the Board, petition any district court of the United States (including the District Court of the United States for the District of Columbia) within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, not withstanding any other provision of law: *Provided further*, That no temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable and such temporary restraining order shall be effective for no longer than five days and will become void at the expiration of such period. Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony: *Provided further*, That for the purposes of this subsection district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in promoting or protecting the interests of employee members. The service of legal process upon such officer or agent shall constitute service upon the labor organization and make such organization a party to the suit. In situations where such relief is appropriate the pro-

cedure specified herein shall apply to charges with respect to section 8 (b) (4) (D).

* * *

The relevant provisions of H. R. 3020, as it passed in House, 80th Cong., 1st Sess. are as follows:

"DEFINITIONS

"SEC. 2. When used in this Act—

* * * *

"(11) The terms 'bargain collectively' and 'collective bargaining' as applied to any disputes between an employer and his employees or their representative mean compliance with the following minimum requirements:

* * *

Such terms shall not be construed as requiring that either party reach an agreement with the other, accept any proposal or counterproposal either in whole or in part, submit counterproposals, discuss modification of an agreement during its terms except pursuant to the express provisions thereof, or discuss any subject matter other than the following: (i) Wage rates, hours of employment, and work requirements; (ii) procedures and practices relating to discharge, suspension, lay-off, recall, seniority, and discipline, or to promotion, demotion, transfer and assignment within the bargaining unit; (iii) conditions, procedures, and practices governing safety, sanitation, and protection of health at the place of employment; (iv) vacations and leaves of absence; and (v) administrative and procedural provisions relating to the foregoing subjects.

* * *

"(14) The term 'illegal boycott' means a concerted refusal, or threat of a concerted refusal, by individuals in the course of their employment—

* * *

"(C) to use, install, handle, transport, or otherwise deal with particular articles, materials, or commodities by reason of the origin or proposed destination thereof, or by reason of the character of a prior or proposed future handling thereof, or by reason of the policies or practices of any person (not their employer) having any direct or indirect relationship thereto.

* * *

"RIGHTS OF EMPLOYEES

"SEC. 7 (a) Employees shall have the right to self-organization, to form, join, or assist any labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities (not constituting unfair labor practices under section 8 (b), unlawful concerted activities under section 12, or violations of collective-bargaining agreements) for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities: Provided, That nothing herein shall preclude an employer from making and carrying out an agreement with a labor organization as authorized in section 8 (d) (4).

* * *

"UNFAIR LABOR PRACTICES

"SEC. 8. * * *

* * *

"(b) It shall be an unfair labor practice for an employee, or for a representative or any officer of a representative, or for any individual acting for or under the direction of a representative, or for or under the direction of any officer thereof—

* * *

"(3) to call, authorize, engage in, or assist any strike or other concerted interference with an employer's operations, an object of which is to compel the employer to accede to the inclusion in a collective-bargaining agreement of any provision which under section 2 (11) is not included as a proper subject matter of collective bargaining.

* * * *

"UNLAWFUL CONCERTED ACTIVITIES

"SEC. 12. (a) The following activities, when affecting commerce, shall be unlawful concerted activities:

* * *

"(3) Calling, authorizing, engaging in, or assisting—

"(A) any sympathy strike, jurisdictional strike, monopolistic strike, or illegal boycott, or any sit-down strike or other concerted interference with any employer's operations conducted by remaining on the employer's premises:

* * *

"(b) Any person injured in his business, person, or property by any unlawful concerted activity affecting commerce may sue the person or persons responsible therefor in any district court of the United States having jurisdiction of the parties, without regard to the amount in controversy, and may recover the damages sustained by him as a result of such unlawful concerted activity, together with the costs of the suit, including a reasonable attorney's fee.

"(c) No provision of the Act of March 23, 1932, entitled 'An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes', shall have any application in any action or proceeding in a court of the

United States involving any activity defined in this section as unlawful.

"(d) A person who is found to have engaged in any activity herein defined as an unlawful concerted activity shall be subject to deprivation of rights under this Act to the same extent as a person found to have engaged in an unfair labor practice under section 8 (b) or 8 (c).

"(e) Except as specifically provided in this section, nothing in this Act shall be construed to diminish the right of employees to strike or to engage in other lawful concerted activities. No provision of this Act, and no order of any court issued hereunder, shall be construed to require any individual to perform labor or service without his consent.

* * *

TITLE III—MONOPOLISTIC PRACTICES OF LABOR ORGANIZATIONS; LIABILITY OF LABOR ORGANIZATIONS; MISCELLANEOUS PROVISIONS

Monopolistic Practices

SEC. 301. (a) The second paragraph of section 20 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914, as amended, is amended by inserting before the period at the end thereof a colon and the following: "Provided, That nothing in this paragraph shall be construed in any proceeding, civil or criminal, under the antitrust laws to make lawful any combination, contract, or conspiracy in restraint of trade having as its purpose one or more of the objects which are defined in section 6 as not being legitimate objects of a labor organization".

(b) Section 6 of the Act entitled "An Act to supplement existing laws against unlawful restraints and

monopolies, and for other purposes", approved October 15, 1914, as amended, is amended by inserting before the period at the end thereof a colon and the following: "Provided, however, That it shall not be within the legitimate objects of labor organizations or the officers, representative, or members thereof, to make any contract, or to engage in any combination or conspiracy, in restraint of commerce, if one of the purposes or a necessary effect of such contract, combination, or conspiracy is to join or combine with any person to fix prices, allocate customers, restrict production, distribution, or competition, or impose restrictions or conditions, upon the purchase, sale, or use of any product, material, machine, or equipment, or to engage in any concerted activity declared to be unlawful under section 12 of the National Labor Relations Act, as amended".

(c) In any proceeding involving a violation of the antitrust laws, the provisions of the Act of March 23, 1932, entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes", shall not have any application.

* * *

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 586

LOCAL UNION NO. 25 OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, and the following, as individuals and representatives of said Local Union No. 25 of Boston, Massachusetts: EDWARD F. JENKINS, MICHAEL J. NORTON and WILLIAM J. McCARTHY, *Petitioners*,

v.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, *Respondent*.

BRIEF OF THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

WILLIAM T. GRIFFIN,
233 Broadway,
New York, New York.

HERBERT BURSTEIN,
135 Broadway,
New York, New York,
Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. .....

LOCAL UNION NO. 25 OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, and the following, as individuals and representatives of said Local Union No. 25 of Boston, Massachusetts: EDWARD F. JENKINS, MICHAEL J. NORTON and WILLIAM J. MCCARTHY, Petitioners,

v.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, Respondent.

BRIEF OF THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Opinion of the Court Below

The opinion of the Supreme Judicial Court of Massachusetts (App. A of Petition) is reported in 1954 Massachusetts Advance Sheets 827, 122 N. E. (2d) 759.

Jurisdiction

In filing their petition for a writ of certiorari, petitioners have invoked the jurisdiction of this Court under Title 28, U. S. C. Section 1237(3) (Act of June 25, 1948, c. 646, 62 Stat. 929).

Question Presented

Whether the National Labor Relations Act (61 Stat. 136, 29 U. S. C. § 151 et seq.) precludes a state court from granting an injunction, at the instance of a railroad, where a union, which has no dispute with, or claim against, the railroad, induces or encourages individual drivers of motor carriers, in violation of an existing collective bargaining agreement, to refuse to deliver trailers to the railroad for transportation and thereby tortiously interferes with the advantageous business relationship between the railroad and the motor carriers.

Statutes Involved

The controversy which gave rise to this case is neither contemplated nor governed by the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. § 151, et seq.).

The issues in dispute were, and must be, resolved by reference to the common law of the Commonwealth of Massachusetts and the provisions of the Massachusetts statutes G. L. (Ter. Ed.) c. 149, Sections 20C and 24, G. L. (Ter. Ed.) c. 214, Section 9A, G. L. (Ter. Ed.) c. 93, Section 2. These are set forth in the Appendix, infra, pages 17 to 25.

Statement

This case arose when petitioners, who represent drivers and helpers employed by motor carriers in Boston, Massachusetts, picketed at, and trespassed upon, premises of the respondent and induced and encouraged individual drivers employed by motor carriers who approached respondent's

Yard No. 5 in Boston, Massachusetts, to refuse to deliver trailers to the railroad for transportation.

The salient facts are these: the respondent is a railroad engaged in the interstate transportation of general commodities and passengers by rail, subject to the provisions of the Interstate Commerce Act, Part I (49 U. S. C. Section 1 et seq.) and the Railway Labor Act (45 U. S. C. Section 151, et seq.) (R. 189). The petitioner union is a trade union which represents drivers and helpers employed by motor carriers in Boston, Massachusetts (R. 189-190).

Respondent provides a specialized common carrier facility known as "piggy-back" or trailer-on-flat-car service (R. 58, 76, 83, 84-85 and 95) which operates in the following manner: a motor carrier, located in Boston, Massachusetts, will send a motor tractor and trailer to the respondent's Yard No. 5 in Boston, where the trailer is disengaged from the tractor and placed upon a railroad flat car.[1] The work of driving the trailer onto the flat car is performed by drivers employed by New England Transportation Company, a motor carrier subsidiary of the railroad, subject to Part II of the Interstate Commerce Act (R. 72-73). However, once the trailer is on the flat car, it is tied down or untied by employees of the respondent who are members of, and represented by, the Brotherhood of Railroad Carmen of America (R. 54, 72-73). The trailer is thereafter carried, as if it were a container, over the railroad tracks to New York City where the motor carrier's tractor engages it and brings it to a terminal or a consignee in New York (R. 13, 52-54, App. A of Petition, pp. 19-20).

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[1] Piggy-back service has been employed by the general public, including individual shippers and motor carriers (R. 53). Charges are assessed pursuant to a tariff filed with and approved by the Interstate Commerce Commission (R. 53-54). Specially designed equipment peculiarly adapted to the service is used only in that service (R. 61, 62), but has no value for ordinary transportation purposes (R. 65).

The petitioner union was party to a collective bargaining agreement with various motor carriers in Boston who employed the railroad's piggy-back service. This agreement did not prohibit or limit the use of flat cars (R. 135).

The history of the collective bargaining negotiations between the petitioner union and the motor carriers reveals that, commencing in 1946, the petitioner union proposed a prohibition against piggy-back operations, but the contract, when negotiated, eliminated the inhibitory clause (R. 131-133, 243). A similar clause prohibiting the use of flat cars was suggested in the proposed agreement of 1949, but this clause was again eliminated (R. 133-135). The current contract contained no provision limiting or prohibiting the use of flat cars (R. 253, 254-259). Indeed, no contract ever negotiated by the petitioner union contained a prohibition against flat car operation (R. 135).

Petitioner union entered into agreements with New England Transportation Company with full knowledge of the latter's participation in the piggy-back service and no contract with that company ever prohibited the employment of union drivers in connection with such service (R. 153).[2]

The evidence was equally clear that during the life of the then current agreement, the petitioner union made no demands for the elimination of piggy-back service (R. 243).[3] And the drivers employed by motor carriers were never advised of any dispute concerning piggy-back service between the motor carriers and the petitioner union or its officials prior to July 11, 1952 (R. 61, 119-120).[4] The

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[2] "Piggy-back" service has been provided by the respondent since 1938 (R. 130).

[3] There is testimony about a meeting with several motor carriers to discuss the problem, but the matter was never progressed under the grievance procedure (R. 137-138).

[4] The President of petitioner union testified that he had no notion as to how and when the interference complained of arose (R. 139, 141-142, 144).

grievance procedure prescribed in the collective bargaining agreement between the petitioner union and the motor carriers was not invoked or pursued prior to the commencement of the interference hereafter described (R. 137, 141, 145).

Between July 11, 1952 and July 14, 1952, petitioners Norton and McCarthy appeared and picketed at, and trespassed upon, respondent's Yard No. 5 at Boston (R. 101), hailed individual drivers and prevented them from entering respondent's Yard No. 5 (R. 83, 89, 93, 106-107, 117, 166). Several, but not all, motor carrier drivers were prevented from bringing trailers into Yard No. 5 (R. 68, 74, 83, 95, 176). But not all trailers were prevented from entering or leaving respondent's Yard No. 5 and not all drivers were hailed and stopped (R. 59, 74-75, 97, 169-170, 176, 245). Even in the instance of employees of New England Transportation Company, various trailers were handled while others were not (R. 75-76, 87-88, 96, 101, 170-171). And the interference was limited only to the geographical area adjacent to and within respondent's Yard No. 5. Employees of motor carriers were not induced or encouraged to engage in a concerted cessation of any other driving they performed in the course of their employment (R. 118, 125, 245).[5] As a consequence of the petitioners' actions, the respondent's business was interfered with and damaged (R. 60-61, 304-308) (App. A of Petition, p. 29).

The petitioners stated that there was no dispute with the respondent either in the past or at the date of the interference (R. 147, 169, 218, 240) and that they did not seek

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[5] It appears that two trailers were loaded on flat cars on July 11, 1952 (R. 75); and on July 14, 1952, prior to the appearance of petitioners Norton and McCarthy, trailers were loaded on flat cars without interference (R. 87). The same employee of Stone's Express, Michael A. Benkoski who was prevented from driving a trailer into the respondent's Yard No. 5 for transportation from Boston to New York (R. 117-118) was not prevented from driving trailers out of Yard No. 5 which came in from New York (R. 117).

to represent any of respondent's employees (R. 130, 147, 169).

Except as hereafter stated, the proceedings in the Massachusetts Courts are adequately set forth in the Petition at pages 6-8. Reference to the record will further disclose that the Massachusetts Superior Court found, as a fact, that the case did not involve or grow out of a labor dispute (R. 323).

The Massachusetts Supreme Judicial Court rejected petitioners' contention that the State Court was precluded from granting the injunction. The Court concluded, first, that there was an unlawful secondary boycott as defined by Massachusetts statutes (App. A of Petition, pp. 27-28, 31) and, second, that assuming (though not deciding) the validity of the contention that the petitioners were engaged in a secondary boycott prohibited by Section 8(b)(4)(A) of the National Labor Relations Act (29 U. S. C. Section 158(b)), the respondent could not obtain a remedy through the National Labor Relations Board and hence the State Court was free to exercise its traditional equity jurisdiction (App. A of Petition, pp. 23-26).

Summary of Argument

(A) The questions propounded by the petitioners bear no genuine relationship to and do not incorporate the proven facts upon which the issues in this case were actually resolved.

Review by this Court is clearly unnecessary if petitioners invite solutions to hypothetical questions. Clearly, answers to the questions presented by petitioner union will not provide the judicial criteria and the decisional standards which the petitioners urge as reasons for granting the writ (Petition at pp. 12-14).

The text and construction of petitioners' questions (Petition at pp. 2-3) are intended to pose, in the abstract, the

ideal situation of conduct which is either proscribed as an unfair labor practice[6] within the meaning of Section 8(b)(4)(A) of the National Labor Relations Act, or protected as a concerted activity as defined by Section 7 of the National Labor Relations Act, and is, therefore, insulated against State Court action. But the facts and the evidence in this case do not accord with the artificial design of the questions presented by petitioners.

(B) The pleadings of respondent and petitioners alike alleged that the conduct of the petitioners did not create a secondary boycott within the meaning of Section 8(b)(4)(A) of the National Labor Relations Act. The dispute, if any, was between the petitioner union and the motor carrier employers of petitioners' members. The object of the picketing activity, as described by petitioners, was to secure a modification of the existing collective bargaining agreement between the union and the motor carrier and to compel the motor carriers to transport all of their trailers, including those which formerly were carried by the respondent railroad, over the highways. Petitioners' contention was that the complained-of activity was primary and the incidental effect upon the neutral railroad fell within the protected ambit of "primary" picketing. The evidence, however, establishes that both the object of the petitioner union's alleged primary activity and the method and means employed to attain the objective were not protected under Section 7 of the National Labor Relations Act. Accordingly, the State Court was free to act to prevent a tortious interference with the advantageous business relationship between the neutral railroad and the motor carriers. The incidental effect upon the respondent railroad was enjoinable under the provisions of the Massachusetts statutes (Appendix, infra, pp. 17-25) and the common law of the Commonwealth of Massachusetts.

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[6] Throughout this brief, respondent refers to the unfair labor practice proscribed by Section 8(b)(4)(A) as the "secondary boycott" provision.

(C) Assuming, but not conceding, that the petitioner union's activity was in the nature of a secondary boycott, it was not that kind of boycott which is proscribed by Section 8(b)(4)(A) because these activities were directed at individual employees, at a limited geographical point, and were not intended to induce or encourage a concerted refusal to work. Assuming, further, but not conceding, that the union's activity did create a secondary boycott proscribed by the National Labor Relations Act, the State Court was not precluded from granting relief because an application to the National Labor Relations Board for relief would have been futile. It may be noted, however, that this Court is not required to reach the question as to whether the railroad can secure relief where a charge is made by the railroad of a secondary boycott under Section 8(b)(4)(A) since petitioners and respondent contend that there was no secondary boycott within the meaning of Section 8(b)(4)(A).

ARGUMENT

I. The petitioner union's activity was not protected concerted activity within the meaning of Section 7 of the National Labor Relations Act.

The answer submitted by petitioners alleged, as an affirmative defense, "that the object of all of their activities was to require the various employers (motor carriers) to perform their collective bargaining agreement and or to bargain collectively in good faith under the National Labor Relation Act, * * *" (R. 203, par. 22). Witnesses for the petitioners asserted that the object of the interference on July 11 to July 14, 1952 was "to secure all of the work of driving these trailers" (R. 158, 243).

The petitioner union also testified to the negotiations of various collective bargaining agreements with the motor carriers in which, prior to the consummation of the agreement, a demand for the elimination of flat car service was presented to the motor carrier employers, but rejected by

the latter (R. 131-135, 253-254). No collective bargaining agreement, including the one in existence at the time of the complained-of activity by the union, contained a prohibition against the use of respondent's flat cars (R. 135, 209-210, 253) notwithstanding that during the course of the negotiation of the contract, demands to that effect were made (R. 131, 135, 243). The evidence was also clear that the grievance procedure provided for in the collective bargaining agreement between the petitioner union and the motor carriers was not pursued prior to the commencement of the picketing at the respondent's Yard No. 5 (R. 137, 141-142, 145).

The palpable effect, as well as the object of the picketing, as described by the petitioners, was to violate the existing collective bargaining agreement and thereby to compel the motor carriers to transport all of their trailers over the highways.

But this activity was not protected by Section 7 of the Act. This Court has held that a strike in violation of a contract is not protected under the provisions of Section 7 of the Act. *National Labor Relations Board* v. *Sands Manufacturing Co.*, 306 U. S. 333. See, too, *Hazel-Atlas Glass Co. v. National Labor Relations Board* 127 F. (2d) 109; *In the Matter of National Electric Products Corporation, etc.*, 80 N. L. R. B. 995; *In the Matter of Scullin Steel Company, etc.*, 65 N. L. R. B. 1294; *In the Matter of Joseph Dyson & Sons, Inc., etc.*, 72 N. L. R. B. 445.

So, too, a strike called without prior resort to the contractual grievance procedure, is not protected activity within the meaning of Section 7 of the National Labor Relations Act. *National Labor Relations Board* v. *Dorsey Trailers, Inc.*, 179 F. (2d) 589. Moreover, the evidence being clear that the issue had been fully discussed during the negotiations and the contract concluded between the parties, a strike to achieve a modification during the life of the existing collective bargaining agreement was not protected activity. 29 U. S. C. § 158(d). *The Jacobs Manufacturing*

Company, etc., 94 N. L. R. B. 1214.[7] See, too, *Timken Roller Bearing Co.* v. *N. L. R. B.*, 161 F. (2d) 949; *Allied Mills, Inc.*, 82 N. L. R. B. 854; *Tidewater Associated Oil Co.*, 85 N. L. R. B. 1096; Cox & Dunlop "Duty to Bargain Collectively During the Term of an Existing Agreement," 63 Harv. L. Rev. 1097.

It is significant that the work stoppage was limited to a small geographical area and was carried on intermittently so that some motor carrier trailers were delivered to the railroad and others were not. Recurrent and intermittent work stoppages are not protected concerted activities within the meaning of Section 7. *International Union U.A.W.A., A.F. of L., etc.* v. *Wisconsin Employment Relations Board*, 336 U. S. 245.

It is to be noted, too, that the picketing was described by the petitioners as "ambulatory"; but since the motor carriers had their terminals in Boston, Massachusetts, there was no justification for the picketing at the respondent's Yard No. 5. Indeed, the picketing was carried on even while there were no trucks of the motor carriers in the vicinity. This type of ambulatory picketing has been condemned by the National Labor Relations Board. *Thurston Motor Lines, Inc.*, 110 N. L. R. B. No. 122, 35 LRRM 1112; *Brewery & Beverage Drivers, etc., and Washington Coca-Cola Bottling Works*, 107 N. L. R. B. 104; *In the Matter of Sailors' Union of the Pacific, A.F.L. and Moore Dry Dock Co.*, 92 N. L. R. B. 547; *In the Matter of International Brotherhood of Teamsters, etc., and Sterling Beverages, Inc.*, 90 N. L. R. B. 401; *Amalgamated Meat Cutters, etc. and Western, Inc.*, 93 N. L. R. B. 336; *United Construction Workers, etc. and Kanawha Coal Operators Association*, 94

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[7] The National Labor Relations Board petitioned for enforcement which was granted (*National Labor Relations Board* v. *Jacobs Mfg. Co.*, 196 F. (2d) 680. However, the Board held that the company had not violated the Act in refusing to bargain about group insurance because that matter had been discussed during negotiations. The United States Court of Appeals, Second Circuit, accordingly did not rule on this aspect of the Board's determination (*National Labor Relations Board* v. *Jacobs Mfg. Co.*, supra, at p. 683, footnote 1).

N. L. R. B. 1731; *N. L. R. B.* v. *Service Trade Chauffeurs*, 191 F. (2d) 65.

Finally, the activities of the petitioners interfered with the performance by the respondent railroad of its duties as a common carrier under the Interstate Commerce Act. A strike in violation of a Federal law or which induces a violation of a Federal law is not a protected concerted activity. *Southern Steamship Co.* v. *National Labor Relations Board*, 316 U. S. 31. Interference with interstate commerce is unlawful and enjoinable notwithstanding the provisions of the National Labor Relations Act. *Pacific Gamble-Robinson Co.* v. *Minneapolis & St. Louis Ry. Co., etc.*, 85 F. Supp. 65; *Illinois Cent. R. Co.* v. *International Brotherhood of Teamsters, etc.*, 90 F. Supp. 640. Essentially, the object of petitioners' activity was to create a monopoly in violation of the applicable Massachusetts statute (Appendix, infra, pp. 24-25).

It is clear, therefore, that the petitioners' activities were not protected under Section 7, judged by any criteria.

II. The petitioners' activity did not create a secondary boycott proscribed by Section 8(b)(4)(A) of the National Labor Relations Act.

The petitioners, in their answer, deny any inducement or coercion of employees (R. 200, par. 8-9) and any coercion intended to "force or require" the respondent "to do or perform any act, or to cease to do or perform any act" (R. 203, par. 21). The respondent alleged that the coercion was addressed to motor carrier employers (R. 192, par. 9A) and consistently denied that there was a secondary boycott within the meaning of Section 8(b)(4)(A) of the National Labor Relations Act (R. 43). What is, however, most significant is the uncontradicted evidence that the inducement was directed to individual employees of some motor carriers was geographically limited. Indeed, even in the case of the individual employees approached by the petitioners Norton and McCarthy, there was not a complete cessation

of their work. Thus, witness Benkoski was prevented from bringing a trailer into Yard No. 5, but permitted to bring one out; employees of New England Transportation Company handled some trailers, but were prevented from handling others. Moreover, the work stoppage, if any, was limited to Yard No. 5. Employees of the motor carriers were not prevented from working elsewhere. The cessation of work was individual and intermittent rather than concerted.

It is plain that such conduct does not "amount to such an inducement or encouragement to 'concerted' activity" as Section 8(b)(4)(A) forbids. *National Labor Relations Board* v. *International Rice Milling Company, Inc., et al.*, 341 U. S. 665. See, too, *National Labor Relations Board* v. *Denver Building & Construction Trades Council, et al.*, 341 U. S. 675; *International Brotherhood of Electrical Workers, etc.* v. *National Labor Relations Board*, 341 U. S. 694; *Local 74, United Brotherhood of Carpenters and Joiners of America, etc.* v. *National Labor Relations Board*, 341 U. S. 707.

Concededly, railroad employees were not induced to cease work. This is not a case where the inducement to cease work did, in fact, create a secondary boycott.

Apart from the fact that the means employed by the petitioners were not those described in Section 8(b)(4)(A), the object, according to the petitioners, was not to force either the motor carriers or the railroad from ceasing to do business with each other, but to compel motor carriers to transport all of their trailers over the highways. Accordingly, since neither the means nor the object are contemplated by Section 8(b)(4)(A), there was no secondary boycott.

While the activities of the petitioners did not constitute a boycott under Section 8(b)(4)(A) of the National Labor Relations Act, the Massachusetts courts held that they did create a boycott under the State law. The construction of

the State statute by the State courts is unassailable so long as it does not infringe upon a Federal right or is not in conflict with a Federal statute.

III. If there was a secondary boycott within the meaning of Section 8(b)(4)(A) of the National Labor Relations Act, the State Court was not foreclosed from granting relief because respondent could secure no relief by applying to the National Labor Relations Board.

If it be assumed that the object and the means did, in fact, give rise to a secondary boycott, then it is submitted that the Massachusetts Court correctly concluded that the National Labor Relations Board would not entertain a charge by the railroad. It is, of course, true that the Court of Appeals for the Fifth Circuit did hold, in *International Rice Milling Co. Inc., et al.* v. *National Labor Relations Board*, 183 F. (2d) 21, that a railroad was a person, but the National Labor Relations Board has consistently rejected the construction of Section 8(b)(4)(A) by the Fifth Circuit. The Board has plainly announced that it will not entertain any charge by one who is not an employer as defined in Section 2(2) of the National Labor Relations Act. *International Brotherhood of Electrical Workers, Local 5, etc.* and *Victor M. Sprys*, d/b/a *Sprys Electric Company*, 104 N. L. R. B. 1128; *In the Matter of International Brotherhood of Electrical Workers, etc.* and *Al J. Schneider Co. Inc.*, 87 N. L. R. B. 99; *Illinois Cent. R. Co.* v. *International Brotherhood of Teamsters, etc.*, 90 F. Supp. 640; *Louisville & N. R. Co.* v. *Local Union No. 432, International Woodworkers of America, etc.*, 104 F. Supp. 748; *In the Matter of Heyward Granite Co. etc.*, 18 N. L. R. B. 542;[8] *In the Matter of Mobile Steamship Assn.*, 8 N. L. R. B. 1297;[8] *United States ex rel. Kearns* v. *Illinois*

[8] Decided under the Wagner Act (49 Stat. 449, 29 U. S. C. 151) which contained a similar exemption for railroads.

Central Railroad Company, et al., U. S. D. C. (N. D. 1952 Ill.) 31 L. R. R. M. 2192.

It is not necessary for this Court to decide whether the Board's construction is erroneous. It is enough to establish that an application for relief to the Board would have been futile and there was no obligation on the part of the respondent to apply for relief.[9] *Building Trades Council, et al.* v. *Kinard Construction Co.*, 346 U. S. 933.

It would be anomalous to suggest that the respondent could not apply for relief in the State courts until it filed a futile charge with the Board and suffered irreparable damage pending the Board's reaffirmation of its policy of rejecting charges filed by persons not included within the statutory definition of employer.

Since the Union's action was not protected under Section 7 and did not violate Section 8(b)(4)(A), but had a coercive effect on the railroad, the State Court was free to act. *International Union U. A. W. A. etc.* v. *Wisconsin Employment Relations Board*, 336 U. S. 245.

Surely, where there has been an obstruction of the streets and highways as in the case at bar, the State may invoke its protective procedures to prohibit such picketing. *Allen Bradley Local No. 1111, etc.* v. *Wisconsin Employment Relations Board*, 315 U. S. 740.

The respondent respectfully submits that since the National Labor Relations Act does not provide a remedy for conduct such as engaged in by the petitioner union, the Massachusetts court was free to act. *United Construction Workers et al.* v. *Laburnum Construction Corp.*, 347 U. S. 656.

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[9] Even in instances where administrative remedies must be exhausted, this Court has recognized the principle that resort may be had to the courts upon clear proof of the futility of pursuing administrative remedies and upon evidence of irreparable harm. *Aircraft & Diesel Equipment Corp.* v. *Hirsch*, 331 U. S. 752, 773-774.

IV. There is no conflict of decisions and there are no important questions of federal law involved.

The decision of the Supreme Judicial Court of Massachusetts is not in conflict with any decision of this Court nor is there a conflict of decisions to be resolved. Indeed, the decisional guides have already been marked out by this Court.

The Massachusetts court did not decide an issue involving the application or construction of a Federal law which is contrary to the governing decisions of this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

WILLIAM T. GRIFFIN,
HERBERT BURSTEIN,
Attorneys for Respondent.

HERBERT BURSTEIN,
of Counsel.

Dated: March 9th, 1955.

APPENDIX

Massachusetts Statutes G.L. (Ter. Ed.) c. 149

SECTION 20C For the purposes of this and the preceding section, section twenty-four of chapter one hundred and forty-nine, sections one, nine and nine A of chapter two hundred and fourteen, and sections thirteen A and thirteen B of chapter two hundred and twenty.

(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft or occupation; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers or associations of employers and one or more employers or associations of employers; or (3) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a "labor dispute" (as hereinafter defined) of "persons participating or interested" therein (as hereinafter defined).

(b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft or occupation.

(c) The term "labor dispute", when used in the sections hereinbefore referred to, includes any controversy arising

out of any demand of any character whatsoever concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange, terms or conditions of employment, regardless of whether the disputants stand in proximate relation of employer and employee.

(d) Except as provided in subsection (e) of this section, the term "lawful labor dispute" includes any controversy concerning:

(1) The association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange, terms or conditions of employment;

(2) The recognition of bargaining status of a labor organization;

(3) Rates of pay, wages, hire or tenure of hours of employment, or working conditions;

(4) The execution or performance of an agreement to arbitrate an existing or future labor dispute;

(5) The execution or performance of a collective bargaining agreement containing any lawful provision of a kind commonly found in collective bargaining agreements (including but not limited to any provision requiring as a condition of employment membership in a labor organization which is the exclusive representative of the employees in the appropriate collective bargaining unit covered by such agreement when made); or

(6) Any term or condition of employment which has heretofore been regarded as a lawful objective of concerted activities on the part of employees or labor organization.

The foregoing definition shall be applicable regardless of whether the disputants stand in the proximate relation of employer and employee, but shall not be deemed to include any "unlawful labor dispute" or "unlawful secondary boycott" as defined in the following subsections:

(e) The term "unlawful labor dispute" includes any controversy arising out of a demand—

(1) That an employer commit a criminal offense or unfair employment practice in violation of chapter one hundred and fifty-one B or unfair labor practice either in violation of chapter one hundred and fifty A, or in the violation of the National Labor Relations Act;

(2) That an employer include in a collective bargaining agreement any provision the execution or performance of which would be unlawful;

(3) That an employer recognize or bargain collectively with any labor organization as the representative of its employees in any bargaining unit while another labor organization is the representative of such employees certified by the labor relations commission established by section nine O of Chapter twenty-three, or by the National Labor Relations Board, prior to the time said commission, or board, would conduct a new investigation and certification of representatives.

(4) That an employer recognize or bargain collectively with any labor organization as the representative of its employees in any bargaining unit within one year after the labor relations commission established by section nine O of chapter twenty-three has determined in a proceeding under section five of chapter one hundred and fifty A that such employees do not desire to be represented by such labor organization; or

(5) Made by any party to a jurisdictional dispute as defined in section nine B of chapter two hundred and fourteen who has failed to abide by any voluntary arbitration procedure applicable to such dispute or to comply with the terms of the arbitration award.

(f) The term "unlawful secondary boycott" means any strike, slowdown, boycott or concerted cessation of work or withholding of patronage or services, arising out of a labor dispute, where an object thereof is to force or require any person not otherwise engaged in such labor dispute to cease using, selling, handling, transporting, or dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; provided, however, that a secondary boycott may be lawfully directed at a person the greater part of whose current business over a representative period is processing, selling, handling, transporting or otherwise dealing in the goods of an employer primarily interested in a lawful labor dispute or who, by any agreement, understanding or arrangement with such employer, is requiring his own employees to perform work or services which would be done by the employees of such employer in the absence of a labor dispute (1950, 452, §§ 1, 2, apvd. May 11, 1950; effective 90 days thereafter).

G. L. (Ter. Ed.) c. 214

SECTION 9A INJUNCTIONS IN LABOR DISPUTES (1) No court shall have jurisdiction to issue a preliminary or permanent injunction in any case involving or growing out of a labor dispute, as defined in section twenty C of chapter one hundred and forty-nine, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect—

(a) The unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;

(b) That substantial and irreparable injury to the complainant's property will follow;

(c) That as to each item of relief granted greater injury will be inflicted upon the complainant by the denial of relief than will be inflicted upon the defendants by the granting of relief;

(d) That the complainant has no adequate remedy at law; and

(e) That the public officers charged with the duty to protect the complainant's property are unable or unwilling to furnish adequate protection.

(2) Such hearing shall be held after due and personal notice thereof has been given, in such manner as the court shall direct, to all known persons against whom relief is sought, and also to the chief of those public officials of the city or town within which the unlawful acts have been threatened or committed charged with the duty to protect the complainant's property; provided, however, that if a complainant shall also allege that, unless a temporary restraining order shall be issued without notice, a substantial and irreparable injury to the complainant's property will be unavoidable, such a temporary restraining order may be issued upon testimony under oath, sufficient if sustained, to justify the court in issuing a preliminary injunction upon a hearing after notice, and a statement of the grounds

justifying the issuance of such order shall be made a matter of record by the court; provided, further, that no such temporary restraining order shall be issued except upon its also being made to appear to the satisfaction of the court (either from the testimony of witnesses or from written assurances filed by counsel in regard to his personal conduct)—

(A) That a principal representative or attorney of the employees or labor organization participating in such dispute was informed of the time and place at which the application for a temporary restraining order would be presented sufficiently in advance to appear in opposition thereto; or

(B) That the complaint made every reasonable effort to comply with paragraph (A) but was unable so to do; provided, however, that notification by mail alone shall not be deemed compliance with this section without proof of receipt.

Such testimony or written assurances shall set forth in detail the manner in which the complainant complied with paragraph (A) or (B) and shall be made part of the record in the case. If the defendants appear in opposition to the application for a temporary restraining order they shall be afforded an opportunity to cross-examine the complainant's witnesses at such length as is reasonable under the circumstances and a like opportunity to introduce evidence in opposition thereto. Such a temporary restraining order shall be effective for no longer than five days and shall become void at the expiration of said five days and shall not be subject to renewal. No temporary restraining order or preliminary injunction shall be issued except on condition that the complainant shall first file an undertaking with adequate security in an amount to be fixed by the court sufficient in its opinion to recompense those enjoined for any loss, expense or damage caused by the improvident or erroneous issuance of such order or injunction, including

all reasonable costs (together with a reasonable attorney's fee) and expense of defense against the order or against the granting of any injunctive relief sought in the same proceeding and subsequently denied by the court.

(3) The undertaking herein mentioned shall be understood to signify an agreement entered into by the complainant and the surety upon which a decree may be rendered in the same suit or proceeding against said complainant and surety, upon a hearing to assess damages of which hearing the complainant and surety shall have reasonable notice, the said complainant and surety submitting themselves to the jurisdiction of the court for that purpose. But nothing herein contained shall deprive any party having a claim or cause of action under or upon such undertaking from electing to pursue his ordinary remedy by action at law or suit in equity.

(4) No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or, who has failed to make every reasonable effort to settle such dispute, either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration.

(5) No restraining order, other than a temporary restraining order issued without notice as provided in subdivision (2) of this section, and no preliminary or permanent injunction shall be granted in a case involving or growing out of a labor dispute, except on the basis of findings of fact made and filed by the court in the record of the case prior to the issuance of such restraining order or injunction; and every restraining order or injunction granted in a case involving or growing out of a labor dispute shall include only a prohibition of such specific act or acts as may be expressly complained of in the bill of complaint or petition filed in such case and as shall be expressly included in said statement of grounds or findings of fact made and filed by the court as provided herein.

(6) Whenever the court shall issue or deny a preliminary injunction in a case involving or growing out of a labor dispute, the court, upon the request of any party to the proceeding, shall forthwith report any questions of law involved in such issue or denial to the supreme judicial court and stay further proceedings except those necessary to preserve the rights of the parties. Upon the filing of such report, the questions reported shall be heard in a summary manner by a justice of the supreme judicial court, who shall with the greatest possible expedition affirm, reverse or modify the order of the superior court. The decision of such justice of the supreme judicial court upon the questions so raised shall be final, but without prejudice to the raising of the same questions before the full court upon exceptions, appeal or report after a final decree in the case. (1935, 407 § 4, appvd. July 12, 1935; 1950, 452, § 3, appvd. May 11, 1950; effective 90 days thereafter.)

G.L. (Ter. Ed.) c. 93

SECTION 2. MONOPOLIES AND DISCRIMINATIONS IN THE SALE OF ARTICLES, ETC., IN COMMON USE PROHIBITED. Every contract, agreement, arrangement, combination or practice in violation of the common law whereby a monopoly in the manufacture, production, transportation or sale in the commonwealth of any article or commodity in common use is or may be created, established or maintained, or whereby competition in the commonwealth in the supply or price of any such article or commodity is or may be restrained, or prevented or whereby, for the purpose of creating, establishing or maintaining a monopoly within the commonwealth of the manufacture, production, transportation or sale of any such article or commodity, the free pursuit in the commonwealth of any lawful business, trade or occupation is or may be restrained, or whereby the price of any article or commodity in common use is or may be unduly enhanced within the commonwealth, is hereby declared to be against public policy, illegal and void.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 33

LOCAL UNION NO 25 OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, and the following, as individuals and representatives of said Local Union No. 25 of Boston, Massachusetts; EDWARD F. JENKINS, MICHAEL J. NORTON and WILLIAM J. MCCARTHY,

Petitioners,

v.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPERIOR COURT OF THE COMMONWEALTH OF MASSACHUSETTS

BRIEF FOR RESPONDENT

WILLIAM T. GRIFFIN,
233 Broadway,
New York, New York,

HERBERT BURSTEIN,
135 Broadway,
New York, New York,

Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 33

LOCAL UNION NO. 25 OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, and the following, as individuals and representatives of said Local Union No. 25 of Boston, Massachusetts; EDWARD F. JENKINS, MICHAEL J. NORTON and WILLIAM J. MCCARTHY,

Petitioners,

v.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

Respondent.

BRIEF FOR RESPONDENT

Jurisdiction

The jurisdiction of this Court is invoked under the provisions of Title 28, U. S. C. 1257(3). (Act of June 25, 1948, c. 646, 62 Stat. 929.)

Constitutional and Statutory Provisions Invoked

Provisions of the Labor Management Relations Act of 1947, as amended (61 Stat. 136, 29 U. S. C. 141, et seq.).

in addition to those set forth by Petitioners, and the pertinent provisions of Massachusetts statutes (G. L. Ter. Ed.) c. 149, Sections 20C and 24, G. L. (Ter. Ed.) c. 214, Section 9A, G. L. (Ter. Ed.) c. 93, Section 2, are set forth in the Appendix to this brief, infra, pages (i to xiii).

Preliminary Statement

In this case, the Supreme Court granted certiorari limited to one question and transferred the cause to the summary calendar. This suggests the Court's concern with a relatively narrow issue. *United Construction Workers, etc.* v. *Laburnum Construction Corporation,* 347 U. S. 656, 659.

Respondent respectfully submits that Petitioners' brief does not appear to be directed specifically to the jurisdictional question before the Supreme Court. Only an abundance of caution constrains Respondent to reply to several contentions, advanced by Petitioners, which may be irrelevant or, at least, beyond the scope of the issues before this Court.

Summary of the Argument

1. There is no conflict of remedies and no issue of preemption present in this case. The Labor Management Relations Act of 1947, as amended (herein sometimes called the "Act" or the "Labor Act" or the "Taft-Hartley Law") does not apply to railroads or railroad employees. Congress did not intend to foreclose railroads from seeking relief in a state court, even where the railroad is the victim of an unfair labor practice, as defined by the Act. In any event, Respondent's application to the Labor Board for relief would have been futile.

2. There was no secondary boycott involved in this case because neither the means nor the object proscribed by Sec-

tion 8(b)(4)(A) of the Act were present (29 U. S. C. 158 (b)(4)(A)).

3. The Petitioners' strike and work stoppage violated a collective bargaining agreement between the Petitioner Union and the motor carriers, including New England Transportation Company (herein called the "New England"); the strike was intermittent and the picketing, ambulatory. Accordingly, the Petitioners' activities were not protected by Section 7 of the Act (29 U. S. C. 157).

POINT I

Railroads are entirely excluded from the Labor Management Relations Act; Congress did not intend to restrict railroads to the remedies and procedure prescribed by the Act.

Respondent believes that the basic issue to be resolved is whether a railroad which seeks injunctive relief against conduct by a union, apparently within the compass of the Act, is limited to the remedies and procedures prescribed by the Act.[1]

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[1] This issue, assumes, as Respondent contends (pp. 20 to 24, infra), that Petitioners' activities were not protected under Section 7 of the Act and that the Petitioners committed an unfair labor practice as defined in Section 8(b)(4)(A). Respondent submits, however, that there was no unfair labor practice present in this case. Hence, the petitioners' activities were neither protected nor prohibited by the Act. Consequently, even if railroads are governed by the Act, the Massachusetts State Court could enjoin picketing in aid of an object which violates the public policy and statutes of Massachusetts. *Giboney et al. v. Empire Storage & Ice Company*, 336 U. S. 490, *International, etc.* v. *Hanke*, 339 U. S. 470.

In the *United Construction Workers, etc.* v. *Laburnum Construction Corporation*, 347 U. S. 656, the right of the employer to file a charge with the Labor Board was recognized. However, since the Board had no power to award damages, the employer was free to maintain an action in the State court. While the absence of a

A review of the legislative history and an analysis of the statute demonstrates, compellingly, that the Act was not designed to, and does not, in fact, apply to railroads and railroad employees.

A. The legislative history of the Act discloses a Congressional intention to exclude railroads and railroad employees from the compass of the Act.

Railroads and their employees were subject to the provisions of the Railway Labor Act long before the adoption of the Wagner Act (49 Stat. 449, 29 U. S. C. 151 et seq.). Notwithstanding repeated amendments, Congress never incorporated into the Railway Labor Act a scheme of unfair labor practices or an administrative procedural system similar to that found in the Labor Act. It is evident that Congress not only intended to accord special statutory treatment to railroads, but to limit the powers of the administrative agencies established by the Railway Labor Act. Surely, a system of administrative procedure in cases involving railroads and their employees, similar to the one found in the Labor Act, could have been, but was not, accomplished by amendments to the Railway Labor Act. A Congressional design to supplement or supersede the Railway Labor Act by applying certain provisions of the Labor Act to railroads could have been, but was not, effected by specific language.[2]

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conflict of remedies explains the decision in that case, the significance of the opinion is this: if Congress did not intend to restrict employers to the remedies prescribed by the Act, an employer not subject to the Act may properly pursue a remedy in the State courts and the remedy before the Board is cumulative rather than exclusive. Thus, Section 10(a) of the Act specifically provides that the power of the Board "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise" (29 U. S. C. 160(a)).

[2] This is illustrated by the language of Title II of the Labor Management Relations Act, as amended. Title II did not appear, in any form, in the Wagner Act. Section 212 states that Title II "shall not be applicable with respect to any matter which is subject to the pro-

The Labor Act, in its original and amended text, is instinct with a Congressional intention to exclude railroads from the jurisdiction of the Labor Board and the ambit of the Act. Thus, the Wagner Act specifically omitted railroads from the definition of "employer."[3]

Although the Labor Board, under the original Act, had never assumed jurisdiction over railway employees, Congress amended the definition of "employee" to avoid a possible, even if remote, conflict of interpretation by excluding "any individual employed by an employer subject to the Railway Labor Act." Section 2(3), 29 U. S. C. 152(3).

In the course of the debates on the Taft-Hartley law, the sponsors of the legislation affirmed that neither railroads nor railway labor were covered by the Wagner Act or the proposed amendments.[4]

The exclusion of railroads was not inadvertent. Experience with the Railway Labor Act proved its efficacy. There was, however, no legislation of a similar kind which regulated the vast body of employers and employees outside the railroad industry. To meet the need for a coherent and consistent labor policy, Congress enacted the Wagner Act. When Congress amended the Wagner Act, its purpose was not to supersede the Railway Labor Act or to bring new categories of employers and employees within the reach of the Labor Act, but to create a balance of bargaining power

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visions of the Railway Labor Act, as amended from time to time" (61 Stat. 156, 29 U. S. C. 182). The necessary implication from the language is that matters not covered by the Railway Labor Act but contemplated by Title II are subject to the provisions of Title II. No such language appears in Title I.

[3] The term "employer" * * * shall not include * * * any person subject to the Railway Labor Act, as amended from time to time * * * 29 U. S. C. 152(2).

[4] 93 Cong. Rec. 6658, 2 Legislative History of the Labor Management Relations Act, 1947 (hereafter referred to as "Leg. Hist."), p. 1571. In *Mobile Steamship Association*, 8 N. L. R. B. 1297, the Labor Board held that railroads were excluded from coverage under the Wagner Act.

between employees and employers, then subject to the Labor Act, and to impose restraints upon "certain practices by some labor organizations." 29 U. S. 151. Thus, Section 8 of the Wagner Act, proscribed employer unfair labor practices only. The Taft-Hartley law retained, with some change in subdivision (3), the text of the original section; it did not extend its application to employers other than, or in addition to, those covered by the Wagner Act. When subdivision (b) to Section 8 was added, listing a series of union unfair labor practices, the inhibitions of the new section 8(b) were limited to labor organizations, as originally defined in the Wagner Act.

Simply stated, the objective of the original and amended Labor Act was to establish a *limited* code of regulation, and by creating an administrative procedural system, to promote a national labor policy of *limited* ambit and to provide a limited category of remedies. Thus, an employer subject to the Act who seeks injunctive relief against an unfair labor practice committed by a union subject to the Act, must proceed before the Labor Board. The same employer, may, however, seek an award of damages in the state or federal courts for the precise conduct. *United Construction Workers, etc.* v. *Laburnum Construction Corporation, supra* (p. 3). Further, this employer may apply for injunctive relief in a state or federal court when the labor organization involved is, like a railroad union, beyond the reach of the Act.

It is a mistaken notion that the Act preempts the entire field of labor activity. The Act occupies only that area of industrial labor relations which is specifically embraced within the four corners of the statute. Railroads and railway unions are, as the Labor Board has held, beyond the scope of the Act and its remedial powers:

> "Our conclusion in this respect is buttressed by the separate treatment that Congress has historically accorded railroads, their employees and the organizations of their employees. In our opinion, a sudden contrary intent on the part of the Eightieth Congress should not

be inferred in the absence of a clear expression in the statute that such was the Congressional purpose. We find no suggestion of such a clear expression here. Indeed, the fact that the 1947 amendments changed the definition of employee by excluding persons 'employed by an employer subject to the Railway Labor Act' whereas no such exclusion was contained in the Wagner Act before amendments is, if anything, an expression of an opposite intention" (p. 361).

International Rice Milling, et al., 84 N. L. R. B. 36, 361.[5]

B. The text of the statute makes clear that the Act cannot and does not apply to railroads.

To contend that, under some circumstances, a railroad employer is restricted to the remedies under the Act is to suggest either a partial repeal, by implication, of the Railway Labor Act or that two distinct and separate statutes, like tenants-in-common, jointly occupy overlapping and undivided areas of the same field. Any such implication or conclusion is negated by the text of the Act.[6]

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[5] The Labor Board's construction of the Act was rejected by the Court of Appeals for the Fifth Circuit. *International Rice Milling Co., Inc.* v. *National Labor Relations Board*, 183 F. (2d) 21 (C. A. 5th). Although an appeal was taken to the Supreme Court, the issue of the Board's jurisdiction over a charge by a railroad under Section 8(b)(4)(A) was neither raised nor decided by the Court. 341 U. S. 665, 668-669. Upon remand, the Labor Board, in the case above, did issue a complaint, but the decision of the Court of Appeals does not touch the issue presented here.

[6] When Congress intended that the Act repeal or supersede the provisions of any other statute, it said so expressly. Thus, Section 15 of the Act provides: "Wherever the application of the provisions of Section 272 of Chapter 10 of the Act entitled 'An Act to establish a uniform system of bankruptcy throughout the United States,' approved July 1, 1898, and Acts amendatory thereof and supplementary thereto (U. S. C. Title II, Sec. 672) conflicts with the application of the provisions of this Act, this Act shall prevail: *provided*, that in any situation where the provisions of this Act cannot be validly enforced, the provisions of such other Acts shall remain in full force and effect." 61 Stat. 151, 29 U. S. C. 165.

The powers of the Labor Board and the rights and obligations of employers and unions are derived from, and described in Sections 7, 8, 9, 10 and 11 of Title I and Sections 301 and 303 of Title III.

Section 7 protects the rights of "employees" to self-organization and to engage in concerted activities, among other things. Since Section 2(3) specifically excludes railroad employees, Section 7 cannot, by definition, apply to railroad workers whose rights, of course, are protected by the Railway Labor Act.

Section 8(a) cannot apply to railroads because it defines the unfair labor practices of "an employer." Section 2(2) specifically excludes railroads from the definition of "employer." For reasons developed at length in this brief (pp. 9-16; infra). Section (8b) cannot be applied to railroads and railroad unions.

Section 9 which relates to representatives selected or designated for collective bargaining purposes, is manifestly inapplicable to railroads since this subject matter is covered by the Railway Labor Act. References in Section 9, to "employees", "labor organizations" and "an employer" confirms this conclusion.

Section 10, which is concerned with the prevention of unfair labor practices, is obviously inapplicable to railroads. Under Section 10, the Board "is empowered * * * to prevent any person from engaging in an unfair labor practice (listed in Section 8) affecting commerce." Clearly, the Board cannot prevent a railroad (even if it is a "person" under the Act) from committing an unfair labor practice under Section 8(a) for reasons already indicated and it cannot proceed against a railroad union for commission of acts proscribed by Section 8(b).

Section 11 which describes the investigatory powers is necessarily integrated with Sections 9 and 10, both of which do not apply to railroads.

Section 301(a) of the Act creates a federal right, in favor of an "employer" and a "labor organization", as defined in the Act, to institute suit for violation of labor contracts. Consequently, the right cannot be invoked by or against a railroad or a railroad union (Section 501, 29 U. S. C. 142).

Section 303(b) is ineffective if the labor organization engaged in the proscribed activity is not subject to the provisions of the Act. It is noteworthy that, unlike Section 301(a), Section 303(b) does not limit the right to sue for damages to employers and unions subject to the Act. "Whoever shall be injured" may maintain a suit. It may perhaps be argued that the jurisdiction of the district courts is original and exclusive,[7] if the person injured elects to sue at law for money damages. However, a suit for injunctive relief in a State court would not amount to a conflicting remedy and, absent the bar of the initial primary jurisdiction doctrine, the injured party may sue for an injunction.

There remains for analysis only Section 8(b) of the Act. Respondent contends that this section was neither intended to limit the remedies available to a railroad nor can it be so construed, as the *proviso* clause which modifies the whole of Section 8(b), unmistakably shows. The clause states:

> "That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer) if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees which such employer is required to recognize under this Act."

If Section 8(b) were intended to apply to railroads, then the proviso clause means that employees who refuse to enter a railroad's premises have no protection at all, or more significantly, are engaged in an unlawful activity.

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[7] *Association of Westinghouse Salaried Employees* v. *Westinghouse Electric Corporation*, 348 U. S. 368.

Simply stated, the proviso means that the employees of a neutral trucking company may lawfully refuse to enter upon the premises of a shipper whose employees are engaged in a strike ratified or approved by a labor organization whom the "employer is required to recognize under this Act."[8] Now, a refusal by the employees of a trucking company, for example, to enter a railroad yard, is unlawful, no matter what the nature of the strike and irrespective of ratification by a labor organization, because a railroad is required to recognize a labor organization under the Railway Labor Act and not the Taft-Hartley law. *Switchmens Union of North America* v. *National Mediation Board*, 320 U. S. 297. Accordingly if Petitioners' argument is sound, what Congress intended to protect would become an unprotected activity.

Obviously, if Section 8(b) applies to railroads, then a secondary boycott is not only an unfair labor practice, but refusal by employees to come upon the railroad's premises is unlawful. The Board has no procedures for dealing with this species of unlawful conduct and the railroad is free to seek any relief which may be available in state or federal courts.

Conceivably, a railroad may be victimized by a Section 8(b)(4)(A) secondary boycott.[9] This circumstance, how-

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[8] Agreements confirming or waiving the rights accorded to employees are lawful. *National Labor Relations Board* v. *Rockaway News Supply Company, Inc.*, 345 U. S. 71, 80.

[9] Under Section 8(b)(4)(A), a secondary boycott occurs when a labor organization induces the employees of a neutral employer to engage in a strike when the object is to force "any employer or other person" to cease doing business with "any other person." Thus, if New England Transportation Company is treated as a neutral employer, if the strike of New England's employees forced the respondent railroad to cease doing business with the motor carriers and if the railroad is considered to be within the class of "any employer" or "other person," then it may be argued that there was a secondary boycott and the respondent railroad was its victim. Does it follow, *a fortiori*, that the railroad was obliged, under these circumstances, to proceed before the Board for relief? An affirma-

ever, does not suggest that Section 8(b)(4)(A) and the procedure set forth in Section 10 apply to railroads.

To begin with, Section 8(b) speaks only of unfair labor practices committed by "a labor organization or its agents." A railroad union is not a "labor organization" as defined in Section 2(5). Since Section 8(b)(4) is a compound of means and objects, a railroad union can never be guilty of inducing a secondary boycott.

An attempt to circumscribe the rights of railroads by imposing the provisions of Section 8(b)(4) and Section 10 leads to absurdities indicated by the illustrations given here. These can be justified only by attributing irrationality to Congress.

Illustration No. 1: Section 8(b)(4)(A) makes it an unfair labor practice for a labor organization * * * to induce * * * the employees of any employer to engage in a strike * * * where an object thereof is: (A) forcing or requiring * * * any employer * * * to cease doing business with any other person.

Assume that a Railroad Union, in an effort to prevent the railroad from purchasing box-cars built under non-union conditions, induces railroad employees to strike, notwithstanding that there is no dispute between the Union and the railroad. The railroad is clearly a neutral employer victimized by a secondary boycott, the object of which is to force the railroad to cease doing business with the box car manufacturer. *National Labor Relations Board* v. *Washington-Oregon Shingle, etc.*, 211 F. 2d 149 (CA 9th). In this instance, the railroad has no remedy under the Labor

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tive answer presupposes that Congress intended that railroads and other persons otherwise expressly excluded from the operation of all other provisions of the Act, be covered only in the instance of a limited category of secondary boycotts. Surely, if this extraordinary exception were intended, explicit language could and would have been incorporated into the text of Section 8(b)(4)(A) and in Section 10 of the Act. But there is no such express statement in the Act.

Act because the union which induced the strike is not a labor organization as defined in Section 2(5) of the Act. However, since there is no labor dispute, injunctive relief could be sought, and probably secured, in the federal courts, or, at least, in the state courts.

When a labor organization, subject to the Labor Act induces employees of a neutral employer to engage in a strike with an object of forcing another employer to cease doing business with a railroad, the latter may be an "other person" referred to in Section 8(b)(4)(A). In this case, the railroad is a kind of third party victim of a secondary boycott. It seems clear that if the railroad qualifies as an "other person", the striking union has violated Section 8(b)(4)(A) and is probably subject to the sanctions of the Labor Act. But to suggest that the railroad is bound by the Labor Act because the union involved violated Section 8(b)(4)(A) means that in this rare case, the railroad has no remedy other than an unfair labor practice proceeding, despite the fact that when it is a direct victim, no such remedy or restriction exists.

Any distinction between the effect on the railroad when it is the direct or the remote victim, is metaphysical and not statutory. It means, in effect, that a railroad union can, with impunity, create protected secondary boycotts. The Act, then becomes a signal for lawlessness, or, at least, a document which completely emancipates railroad unions and other excluded labor organizations from regulation. Surely, Congress did not intend to provide a new technique for paralyzing the railroad industry in these circumstances, a state or federal court could intervene.

Illustration No. 2: Now, if a Railroad Union (PE)[10] having a dispute with a Railroad Employer (PR), pickets a railroad yard and thereby induces the employees of a truck-

[10] The symbols PE stand for Primary Employees, PR—Primary Employer, SE—Neutral Employees and SR—Secondary or Neutral Employers.

ing Company (SE) to engage in a concerted refusal to work, i.e., deliver ordinary freight to the railroad yard, in order to force the Trucking Company (SR) to cease doing business with the Railroad (PR), there appears to be a traditional secondary boycott. Here, indeed, the railroad union did, in fact, "induce the employees of a neutral secondary employer to engage in a strike" with the object of forcing the neutral employer "to cease doing business with any other person" (Railroad), but this cannot be a secondary boycott under Section 8(b)(4)(A) since the Railroad Union is not a "labor organization" as defined in Section 2(5) of the Act.

If the Labor Act applies, railroad unions may freely induce secondary boycotts and railroads would have no remedy before the Labor Board, and, perhaps no other avenue of relief.

Illustration No. 3: If the facts in Illustration No. 2 are reversed so that a Union representing employees (PE) of the Trucking Company (PR) induces railroad workers (SE) to engage in a strike in order to force the Railroad (SR) to cease doing business with the Trucking Company, there appears to be, once again, a traditional secondary boycott. Here a labor organization as defined in the Act (PE), did induce "the employees of any employer" (Railroad) "to engage in a strike" with the object of "forcing or requiring any employer" (Railroad) "to cease doing business with any other person" (Trucking Company).

Obviously, this is not a secondary boycott under Section 8(b)(4)(A) because employees of a railroad are not "employees" as defined in Section 2(3) of the Act.

Here, too, if the Labor Act applies, a Union of employees subject to the Act, may, without restraint, create a secondary boycott if the inducement is limited to employees who are not employees under the Act.

Illustration No. 4: Section 8(b)(4)(D), like 8(b)(4)(A), proscribes secondary activity. It is, accordingly, "an un-

fair labor practice for a labor organization * * * to engage, in a strike * * * when an object thereof is * * * (D) forcing or requiring an employer to assign work to employees in a particular labor organization or in a particular * * * craft * * * rather than to employees in another labor organization or in another * * * craft."

If a dispute arises between porters and trainmen over the work of inspecting brake apparatus, and a trucking union induces its employees to refuse to deliver freight to the railroad in order to force the railroad to assign the disputed work to the trainmen, there appears to be a violation of Section 8(b)(4)(D) if the statutory words "any employer" includes railroads for, in this case, a labor organization subject to the Act (Trucking Union) did induce "employees of any employer" (Trucking Company) "to engage in a strike" with the object of "forcing or requiring any employer" (Railroad) "to assign particular work" to porters, i.e., "a particular * * * craft." To apply Section 8(b)(4)(D) and Section 10 would create a hiatus in the regulatory scheme because the dispute between the porters and the trainmen cannot be resolved by the Labor Board. *Missouri-Kansas Texas R. Co., et al.* v. *Randolph, et al.*, 164 F. (2d) 4 (C. A. 8th), cert. den. 334, U. S. 818; *Illinois Cent. R. Co.* v. *Brotherhood of Railroad Trainmen, Order of Ry. Conductors of America*, 83 F. Supp. 930 (D. C. Ill.).[11]

If the Labor Board attempted to assert jurisdiction in such a case and, following a proceeding under Section 10(k) made an outright award of the disputed work,[12] it

[11] The situation is not theoretical. There are railroad unions affiliated with the C.I.O. and with the A.F.L. and cooperation between other affiliated unions, outside the railroad industry, with the railroad unions has occurred. The answer, however, is clear: railroad unions cannot be subject to the restraints imposed by Section 8(b)(4)(D). *General Committee, etc.* v. *Missouri Kansas-Texas Railroad Company, et al.*, 320 U. S. 323, 334; *General Committee, etc.* v. *Southern Pacific Company*, 320 U. S. 338.

[12] Of course, the usual practice in such cases is for the Labor Board to rule that the actions of one of the unions is unlawful and

would preempt the powers of the National Railroad Adjustment Board under the Railway Labor Act.[13]

While additional illustrations can be provided, they serve only to prove what is self-evident, namely, that Congress did not intend either a complete or piece-meal application of the Labor Act to railroads.

There is a rational basis for the special treatment which Congress has accorded to railroads and their employees. In all other industries, prior to the enactment of the Taft-Hartley law, the boundaries of allowable industrial conflict expanded or contracted with changes in the contemporary political temper and economic climate. In the federal courts, the Norris-LaGuardia Act operated as a bar against injunctive relief. In the state courts, neutral employers covered by the Labor Act, were not protected against secondary strikes and boycotts in aid of objects now proscribed by the Taft-Hartley law. The miscellany of the state court decisions in cases of secondary boycotts called for a uniform and coherent body of legal principles which the Taft-Hartley law attempts to provide. To be sure, railroads had been the victims of secondary action.

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state that its ruling was not to be construed as assigning the work. Injunctive relief, under Section 10(e) may be secured or ultimately, an enforcement proceeding may be instituted in the appropriate Circuit Court.

[13] Act of May 20, 1926, c. 347, Section 2, 44 Stat. 577; June 21, 1934, c. 691, Section 2, 38 Stat. 1146, 45 U. S. C. 151 et seq. It may be noted, too, that in many respects the Taft-Hartley and Railway Labor Act cover substantially the same subject matter. In some areas, there are different regulatory measures. Thus, the Labor Board has no jurisdiction with respect to the enforcement or interpretation of collective bargaining agreements, whereas the National Railroad Adjustment Board, 4th Division, has such power. (Section 153(h).) On the other hand, the Labor Board may, under some circumstances, secure an injunction. The Railway Labor Act makes no provision for injunction and no right for injunctive relief for violations of the Railway Labor Act is conferred upon any administrative agency.

But in cases where a railroad has been impeded in the performance of its statutory duty as a common carrier, relief was obtained in the state and federal courts. *Northwestern Pac. R. Co.* v. *Lumber & Sawmill Workers' Union etc.*, 31 Cal. (2d) 441, 189 P. 2d, 277; *Pacific Gamble Robinson Co.* v. *Minneapolis & St. L. Ry. Co.*, 83 F. Supp. 860, 85 F. Supp. 65 (D. C. Minn.).

In cases involving railroads which were litigated since the enactment of the Taft-Hartley Law, federal and state courts granted relief against secondary action. *Illinois Cent. R. Co.* v. *International Brotherhood of Teamsters, etc.*, 90 F. Supp. 640 (D. C. W. D. La.) (1950); *Montgomery Ward & Company, Inc.* v. *Northern Pacific Terminal Company of Oregon, et al.*, 23 Labor Cases (CCH) ¶ 67,713, (D. C., Dist. of Oregon); *Erie Railroad* v. *Longshoremen's Assn.*, 33 LRRM 2234 (D. C., Western Dist. of N. Y.); *Terminal R. Ass'n of St. Louis* v. *International Association of Machinists, et al.*, 333 Ill. App. 288, 77 N. E. 2d 448; *Millmen Union, Local 324, A. F. L., et al.* v. *Missouri-Kansas-Texas R. Co. of Texas*, 253 S. W. 2d 450; *Stewart et al.* v. *State*, 221 Ark. 496, 254 S. W. 2d 55; *Louisville & N. R. Co.* v. *Local Union No. 432 of International Woodworkers of America*, 104 F. Supp. 748.

C. There was no secondary boycott involved in this case.

Respondent has assumed, for the purposes of its argument, that there was a secondary boycott as defined by the Labor Act and that the Respondent railroad was the victim.[14]

The record discloses that New England, together with the other motor carriers, was a party to a single and uniform

[14] Petitioners state that there was no secondary boycott (p. 16 Petitioners' brief). Except for the fact that Respondent is conscious of a duty to this Court to explore the facts and the law on this aspect of the case, the extended discussion which follows would be unnecessary. If the Petitioners' concession is sufficient for the purposes of this appeal and if this Court relies upon this concession, then Re-

labor contract with the Union (R. 143). The Union's avowed object was to induce all motor carriers under contract with it, including New England, to limit or eliminate their piggy-back operations.

Indeed, if New England is treated as a neutral employer, there was no secondary boycott under Section 8(b)(4)(A) because the object of the Petitioner Union's activities was not proscribed by Section 8(b)(4)(A). To begin with, the declared object of the strike was to secure a portion, or all, of the work handled by the Respondent. This is not prohibited by Section 8(b)(4)(A) even though it is not protected under Section 7.[15]

In *Douds* v. *International Longshoremen's Association, et al.*, 224 F. (2d) 455 (C. A. 2d), secondary strike activity which had as its objective, control of the Port of New York, was held not to constitute a secondary boycott within the meaning of Section 8(b)(4)(A). Judge Learned Hand pointed out that:

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spondent's discussion in Point I (A) and (B) and Point II of this brief (pp. 20 to 24, *infra*) adequately treats the contentions urged by the Petitioners. Incidentally if, as Petitioners contend, the Union was engaged in a primary dispute with New England, the inducement of the motor carrier employees including the employees of New England could not create a secondary boycott, since there was no inducement of neutral employees. *International Rice Milling Company* v. *National Labor Relations Board*, 341 U. S. 645; *International Brotherhood of Electrical Workers, etc.* v. *National Labor Relations Board*, 341 U. S. 694; *National Labor Relations Board* v. *Denver Building and Construction Trades Council, et al.*, 341 U. S. 675; *National Labor Relations Board* v. *Washington-Oregon Shingle, etc.*, 211 F. 2d 149 (C. A. 9th).

[15] The respondent does not concede that a strike to secure all or portions of the transportation business and to thereby effect a monopoly of such work may be lawfully bargained for or may be the lawful object of a strike or peaceful picketing. The term "labor dispute" as defined in Section 2(9) of the Act is not as broad as in the Norris-LaGuardia Act (29 U. S. C. 113). A strike to compel an employer to discontinue the use of labor saving machinery or to compel discontinuance of a more efficient method of production does not give rise to a labor dispute. *Opera-on-Tour, Inc.* v. *Weber*, 285 N. Y.

"When Congress limited the wrong to occasions when the cessation was an 'object' to the conduct, it excluded much indeed that the ordinary law of tort would have included" (p. 459).

Accordingly, unless a secondary strike has for its object the promotion of the general solidarity of unionism either by making common cause with the employees of any other employer engaged in a strike or by bringing pressure to bear on a neutral employer in order to force him to boycott a product, the secondary action is not prohibited under Section 8(b)(4)(A).

D. An application for relief by the railroad would have been futile.

The fact that a charge of an unfair labor practice could have been filed by the motor carriers or even by the railroad is not dispositive of, or relevant to, the issue in this case.[16]

The cardinal inquiry is not whether the respondent railroad could have filed a charge and proceed before the Labor Board, but whether the Respondent was obliged to institute proceedings before the Labor Board and was precluded from applying to the Massachusetts courts for relief. It cannot be disputed, for example, that in an instance where the United States Government may be guilty of anti-union discrimination, a charge may be filed but the Gov-

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348, cert. den. 314 U. S. 615. The Union's conduct is not thereby rendered lawful or protected. Thus, a sit-down strike may not give rise to a boycott and although the striking union is not guilty of an unfair labor practice, the strike is unlawful and not protected.

[16] The Union relies upon the Rules and Regulations of the National Labor Relations Board, 29 C. F. R. Supp. 102.9, 16 F. R. 1937, March 1, 1951, respecting the filing of charges. But the union fails to note that when the Labor Board in the *International Rice Milling* case, supra, n. 5, refused to process a charge by a railroad, the rules in effect at that time provided: "Section 203.9; Who may file; withdrawal and dismissal. A charge that any person has engaged in or is engaging in any unfair labor practice, affecting commerce may be made by any person." (12 F. R. 5656.)

ernment may not be compelled to submit to a Labor Board investigation. So, too, if the United States Government is a victim of a secondary boycott, it may, perhaps, file a charge with the Labor Board but this does not imply or suggest that the Government is either required to file a charge or that the sole forum for relief is the Labor Board. *In the Matter of International Brotherhood of Electrical, etc., and Al J. Schneider*, 87 N. L. R. B. 99, 89 N. L. R. B. 221.

At the time when the Petitioners interfered with the Respondent's business, the Labor Board had announced that it would not be bound by the decision of the Court of Appeals in *International Rice Milling* case, supra, n. 5. *In re International Brotherhood of Electrical Workers, Local 5 etc. and Victor M. Sprys d/b/a Sprys Electric Company*, 104 N. L. R. B. 1128.

Essentially, the whole structure of a claim that a secondary boycott may be invoked against the railroad rests on a tenuous construction of the words "other person" found in Section 8(b)(4)(A).

Respondent contends that the word "person" is generic and applies to those persons who are subject to the provisions of the Labor Act.[17]

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[17] There appears to be no conflict of opinion that the Government is not a person under the Labor Act. The distinction between the Government and any other employer, based on the word "person" is specious. If "person" means "anybody" or "any agency," then it applies with equal force to the Government and the railroad. In many regulatory acts where the term "person" is defined and the Government is not specifically included, this Court has treated the Government as a "person" for certain purposes. *Far East Conference, etc.* v. *United States of America, et al.*, 340 U. S. 570, 576. *United States of America* v. *Public Utilities Commission of the State of California, etc.*, 345 U. S. 295, 312-316.

Moreover, the distinction between a private corporation such as Respondent and a governmental agency does not exist in the instance of a wholly owned government corporation. Neither the United States Goverment nor a governmental corporation was explicitly excluded from the definition of "person" in Section 2(1).

In any event, the Board had declared that it will not take jurisdiction of a case involving a railroad nor process a charge by a railroad. Apart from the fact that the Board had no jurisdiction, it is evident that an attempt to process the case before the Board would have been futile. In these circumstances, Respondent was free to seek injunctive relief in the state courts relieved of the inhibitions of the Norris-LaGuardia Act. The decision by the Massachusetts courts that the granting of an injunction did not violate the Massachusetts statutes is, of course, binding on this Court. Indeed, there being no labor dispute as defined in the Norris-LaGuardia Act, an injunction might have been secured in the federal court upon a properly pleaded complaint.[18] Certainly, if pursuit of an administrative remedy is futile, an injured party may seek relief in the courts.[19]

POINT II

The Union's activity was not protected concerted activity under Section 7 of the Labor Management Relations Act, as amended.

Petitioners' claim that the strike and the picketing at Respondent's yard were protected concerted activities is plainly lacking in merit. A brief review of two relevant facts makes this evident.

The union and the motor carriers, including New England, were parties to a master collective bargaining agreement which did not prohibit "piggy-back" operations (R. 126-127). Petitioners contend, however, that there was a

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[18] *Illinois Cent. R. Co.* v. *International Brotherhood of Teamsters, etc.*, 90 F. Supp. 640 (D. C. W. D. La.); *Louisville & N. R. Co.* v. *Local Union No. 432, etc.*, 104 F. Supp. 748 (D. C. S. D. Ala.); *In Re Texas Electric Bus Lines and Brotherhood of Railroad Trainmen*, 100 N. L. R. B. 67, it was held: "The Board does not have jurisdiction over an employer subject to the Railway Labor Act."

[19] See discussion pp. 25 to 26, infra.

current primary dispute between the Union and the motor carriers concerning "piggy-back" operations. Although this alleged dispute had been discussed by the Union with representatives of the motor carriers, it had never been submitted for decision in accordance with the grievance and arbitration procedure established by the Labor agreement (R. 128, 136, 137). Indeed, the president of the Petitioner union and Petitioner McCarty testified that the Union could properly by-pass the grievance machinery and engage in a strike or other methods of self-help (R. 150, 162, 167-168).[20]

Secondly, the motor carriers who were involved had terminals in Boston (R. 108, 213, 215) but picketing and the work stoppage occurred at the railroad yard. The work stoppage was intermittent so that certain piggy-back operations continued without interruption (R. 70, 71, 183, 165-166).

The strike and the picketing violated the labor contract and these activities, though perhaps concerted, were not protected. Petitioners cannot escape this fundmental principle unless they misread Section 7 of the Act, as indeed they do. Petitioners incorrectly assume that Section 7 was intended only to describe the allowable areas of collective bargaining. This specious notion is the springboard for Petitioners' argument that if a Union may lawfully bargain to secure all or part of the work performed by others, any activity in aid of this bargainable issue is protected, if concerted. The difficulty with Petitioners' analysis is that Section 7 deals with methods and objectives so that an activity which is carried on in an unlawful way to achieve a lawful goal, or an activity carried on by lawful means

[20] Petitioner McCarthy testified that there had been one arbitration case involving one of the trucking companies (R. 164), but this concerned a failure to accord a work opportunity to two drivers previously assigned for work (R. 168) and had nothing to do with the broad issue of the right of drivers to transport trailers then carried by piggy-back (R. 169).

to accomplish an unlawful objective is not protected, even if it is concerted. Unless both the method and objective are lawful, the activity is not protected. Union activity is either fully protected or completely unprotected; Congress did not enact a hybrid class of protected objective—unprotected method activities.

A strike for higher overtime wage rates is, in certain instances, a protected concerted activity. But if the strike violates an existing collective bargaining agreement or other unlawful means are employed, it ceases to be a protected activity under Section 7. *C. G. Conn, Limited* v. *National Labor Relations Board*, 108 F. (2d) 390 (7th C. A.); *National Labor Relations Board* v. *Sands Manufacturing Company*, 306 U. S. 332; *National Labor Relations Board* v. *Draper Corporation*, 145 F. (2d) 199 (C. A. 4th); *Southern Steamship Company* v. *National Labor Relations Board*, 316 U. S. 31.[21]

So, too, a strike called in defiance of a contractual grievance procedure is not a protected concerted activity under Section 7. *In re W. L. Mead, Inc. and Local 25, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A. F. of L.*, 113 N. L. R. B. No. 109, 36 LRRM 1392.[22]

In the *Mead* case, Mr. McCarthy (one of the Petitioners here) refused to submit a dispute to arbitration and, instead, called a strike. The Union contended there, as it

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[21] See, too, *National Labor Relations Board* v. *Fansteel Metallurgical Corporation*, 306 U. S. 240; *B.V.D. Company, etc.*, 110 N. L. R. B. 1412; *Pacific Telegraph & Telephone Company*, 107 N. L. R. B. 1547; *Longview Furniture Company, etc.*, 110 N. L. R. B. 1734; *Honolulu Rapid Transit Company, etc.*, 110 N. L. R. B. 1806. H. Conf. Rep. No. 510, 80th Cong. 1st Sess. 39, 1 Leg. Hist. 543 and 93 Cong. Rec. 6442 in 2 Leg. Hist. 1539.

[22] The *Mead* case involved this Union, one of the individual Petitioners and a collective bargaining agreement with a grievance procedure identical with the one at bar.

does here, that because of the absence of a no-strike clause, its strike was a protected concerted activity under Section 7.

A unanimous Labor Board declared the strike to be "a material breach of a clear and binding contractual arbitration clause" and completely unprotected.

When the Petitioner Union, in the case at bar, violated the labor contract by resorting to a strike and picketing and thereby disregarded the grievance and arbitration procedure, its activity was not protected. Moreover, the partial and intermittent character of the work stoppage [23] as well as the ambulatory nature of the picketing carried on by the Petitioner Union were beyond the ambit of Section 7.[24]

Petitioners compound their error of construction by an error in logic. Thus, they argue that activities which are not prohibited by the Act are necessarily protected.[25]

In International Union, U. A. W. etc. v. Wisconsin Employment Relations Board, 336 U. S. 245, the Supreme Court said:

> "We think that this recurrent or intermittent unannounced stoppage of work to win unstated ends was neither forbidden by federal statute nor was it legalized and approved thereby" (pp. 264-265).

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[23] Picketing was limited as to time; some vehicles were loaded into flat cars (R. 70) and contrary to the Petitioners' contention, trailers operated by at least one carrier under contract were loaded onto the flat cars (R. 153, 165).

[24] *International Union, U. A. W. etc. v. Wisconsin Employment Relations Board*, 336 U. S. 245; *Sterling Beverages, Inc.*, 90 N. L. R. B. 401; *Amalgamated Meat Cutters, etc. (Western, Inc.)*, 93 N. L. R. B. 336; *Washington Coca-Cola Bottling Works*, 107 N. L. R. B. 299; *Thurston Motor Lines, Inc.*, 110 N. L. R. B. 748; *Gotham Broadcasting Corporation*, 110 N. L. R. B. 2166.

[25] In *Association of Westinghouse Salaried Employees v. Westinghouse Electric Corp.*, 348 U. S. 437, 443 (footnote 7) it was pointed out that a breach of contract is not an unfair labor practice and rights and obligations incident to such contracts must be left to the ordinary processes of the law and not to the Labor Board.

POINT III

The Massachusetts Court was free to act since the Union's activity was neither protected by Section 7 nor prohibited by Section 8(b)(4).

Even if it be assumed that the Board has jurisdiction over railroads, the Respondent railroad, in this instance, was free to institute suit in the Massachusetts courts. It has already been demonstrated that the activity engaged in by the Union was not protected nor prohibited by the Act. Accordingly, the Massachusetts Court could properly act to enforce the laws of Massachusetts.[26] *International Union, U. A. W. etc.* v. *Wisconsin Employment Relations Board*, 336 U. S. 245.

Petitioners' contention that the Labor Board's jurisdiction is exclusive so long as interstate commerce is involved is supported neither by legislative history nor decisional precedent.[27] Neither legislative history nor the text of the Labor Act supports any implication that Congress excluded all state controls over secondary activity which does not constitute an unfair labor practice under the Act.

As Mr. Justice Frankfurter, in *Bethelehem Steel Company* v. *New York State Labor Relations Board*, 330 U. S. 767, said:

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[26] The Supreme Judicial Court of Massachusetts is the final arbitrator of the meaning of Massachusetts statutes and the federal courts are bound by its construction. *State of Louisiana ex rel., Willie Francis* v. *Resweber*, 329 U. S. 459, 461-462; *Aero Mayflower Transit Company* v. *Board of Railroad Commissioners of the State of Montana*, 332 U. S. 495, 499; *Independent Warehouses, Inc.* v. *Scheele*, 331 U. S. 70, 86-87; *Moore* v. *Illinois Central Railroad Company*, 312 U. S. 630, 633-634.

[27] It is true that *Garner* v. *Teamsters, etc.*, 346 U. S. 485 suggests that if the commerce facts bring the case within the jurisdiction of the Labor Board, a state court is precluded from acting notwithstanding that the action is neither protected nor prohibited by the Act. But that this was dictum is made clear by subsequent decisions of the Supreme Court.

> "Since Congress can, if it chooses, entirely displace the States to the full extent of the far-reaching Commerce Clause, Congress needs no help from generous judicial implications to achieve the supersession of State authority" (p. 780).

That the preemption doctrine is limited to instances where two similar remedies, one state and one federal, are brought to bear on precisely the same conduct is made evident by the decision in *United Construction Workers etc.* v. *Laburnum Construction Corporation*, 347 U. S. 656 and later in *Weber et al.* v. *Anheuser-Busch, Inc.*, 348 U. S. 468.

In the latter, the decision seems to rest primarily on the question of whether the conduct is protected or prohibited by the Labor Act. This is indicated by the fact that the cases cited consist of three categories: those which hold that the State may not prohibit the exercise of rights which the Labor Act protects; those which hold that a State may no enjoin conduct which has been made an unfair labor practice under the Labor Act and those which support the State's right to deal with conduct not subject to regulation by the Labor Board, either by prohibition or protection.[28]

At best, the Labor Board's jurisdiction is merely primary. Primary jurisdiction, as distinguished from the exhaustion doctrine, involves only the question of initial decision, and it implies concurrent administrative and judicial jurisdiction. *Texas & Pacific Railway Company* v. *Abilene Cotton Oil*, 204 U. S. 426. The failure by an administrative agency to exercise its jurisdiction clears the path to judicial action.

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[28] The issue of futility raised, in part by *Building Trades Council* v. *Kinard Construction Co.*, 346 U. S. 933, is treated elsewhere in this brief. While this Court has indicated that the pleadings may persuasively raise the issue of the Labor Board's exclusive jurisdiction and Petitioners expatiate at length in this aspect of respondent's pleadings (p. 25 of Petitioners' Brief), the Respondents, on the trial, did abandon all claims under the Act (R. 307) and at the conclusion of trial moved to amend the pleadings to conform to the proof. In this motion, Petitioners joined (R. 296). Under Massachusetts law, such a motion effects a sufficient amendment of the pleadings. Mottla, *Massachusetts Practice—Civil* (Rev. Ed. 1948), Section 267, pp. 160-163.

The rejection by the Labor Board of a charge is the final step in the administrative process and the refusal of the Board to issue a complaint on the basis of a charge over which it rejects jurisdiction is not reviewable by any court. *General Drivers, etc. Local 886, etc.* v. *National Labor Relations Board*, 179 F. (2d) 492 (CA 10th); *Lincourt* v. *National Labor Relations Board*, 170 F. (2d) 306 (C. A. 1st).[29]

If administrative relief is impossible or improbable, there is no duty to resort to the agency or to exhaust its remedies. *Aircraft & Diesel Equipment Corporation* v. *Hirsch et al.*, 331 U. S. 752. *Smith, etc.* v. *Illinois Bell Telephone Company*, 270 U. S. 587, 591; *Order of Railway Conductors, etc.* v. *Swan, etc.*, 329 U. S. 520; *Union Pacific Railroad Company* v. *Board of County Commissioners, etc.*, 247 U. S. 282; *Hillsborough etc.* v. *Cromwell*, 326 U. S. 620; *Marino* v. *Ragen*, 332 U. S. 561; *City Bank Farmers Trust Company* v. *Schnader*, 291 U. S. 24.

CONCLUSION

For all of the reasons set forth in this brief, it is respectfully requested that this Court dismiss the petition for writ of certiorari or, in the alternative, affirm the decree of the Massachusetts Superior Court.

Respectfully submitted,

WILLIAM T. GRIFFIN,
HERBERT BURSTEIN,
Counsel for Respondents.

HERBERT BURSTEIN,
of Counsel.

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[29] This accords with decisions under the Wagner Act holding that courts have no jurisdiction to review the action of the Board in exercising its discretion to issue a complaint. *National Labor Relations Board* v. *Indiana & Michigan Electric Company*, 318 U. S. 9; *National Labor Relations Board* v. *Barrett Co.*, 120 F. (2d) 583 (7th C. A.); *National Labor Relations Board* v. *National Broadcasting Co., Inc.*, 150 F. (2d) 895 (C. A. 2d); *National Labor Relations Board* v. *Federal Engineering Co.*, 153 F. (2d) 233 (C. A. 6th).

APPENDIX

The pertinent provisions of the Labor Management Relations Act (61 Stat. 136, 29 U. S. C. 141, et seq.), are as follows:

* * * * * *

Sec. 2. When used in this Act—

* * * * * *

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

* * * * * *

(5) The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

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Sec. 8(a). It shall be an unfair labor practice for an employer: * * *

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Sec. 8(b)(6). It shall be an unfair labor practice for a labor organization or its agents—

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to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed.

* * * * * * *

Sec. 9(a).

(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further,* That the bargaining representative has been given opportunity to be present at such adjustment.

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Sec. 11. For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by sections 9 and 10 * * *.

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Sec. 15. Wherever the application of the provisions of section 272 of chapter 10 of the Act entitled "An Act to establish a uniform system of bankruptcy throughout the United States", approved July 1, 1898, and Acts amendatory thereof and supplementary thereto (U. S. C., title 11; sec. 672), conflicts with the application of the provisions of

this Act, this Act shall prevail: *Provided,* That in any situation where the provisions of this Act cannot be validly enforced, the provisions of such other Acts shall remain in full force and effect.

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Sec. 212. The provisions of this title shall not be applicable with respect to any matter which is subject to the provisions of the Railway Labor Act, as amended from time to time.

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Sec. 301(a). Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

* * * * * * *

Sec. 303(a). It shall be unlawful, for the purposes of this section only, in an industry or activity affecting commerce, for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is—

(1) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person;

(2) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor or-

ganization has been certified as the representative of such employees under the provisions of section 9 of the National Labor Relations Act;

(3) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9 of the National Labor Relations Act;

(4) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class unless such employer is failing to conform to an order or certification of the National Labor Relations Board determining the bargaining representative for employees performing such work. Nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under the National Labor Relations Act.

* * * * * * *

(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) may sue therefor in any district court of the United States subject to the limitations and provisions of section 301 hereof without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.

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Massachusetts Statutes G.L. (Ter. Ed.) c. 149

SECTION 20C For the purposes of this and the preceding section, section twenty-four of chapter one hundred and forty-nine, sections one, nine and nine A of chapter two hundred and fourteen, and sections thirteen A and thirteen B of chapter two hundred and twenty.

(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft or occupation; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers or associations of employers and one or more employers or associations of employers; or (3) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a "labor dispute" (as hereinafter defined) of "persons participating or interested" therein (as hereinafter defined).

(b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft or occupation.

(c) The term "labor dispute", when used in the sections hereinbefore referred to, includes any controversy arising out of any demand of any character whatsoever concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange, terms or

conditions of employment, regardless of whether the disputants stand in proximate relation of employer and employee.

(d) Except as provided in subsection (e) of this section, the term "lawful labor dispute" includes any controversy concerning:

(1) The association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange, terms or conditions of employment;

(2) The recognition of bargaining status of a labor organization;

(3) Rates of pay, wages, hire or tenure of hours of employment, or working conditions;

(4) The execution or performance of an agreement to arbitrate an existing or future labor dispute;

(5) The execution or performance of a collective bargaining agreement containing any lawful provision of a kind commonly found in collective bargaining agreements (including but not limited to any provision requiring as a condition of employment membership in a labor organization which is the exclusive representative of the employees in the appropriate collective bargaining unit covered by such agreement when made); or

(6) Any term or condition of employment which has heretofore been regarded as a lawful objective of concerted activities on the part of employees or labor organization.

The foregoing definition shall be applicable regardless of whether the disputants stand in the proximate relation of employer and employee, but shall not be deemed to include any "unlawful labor dispute" or "unlawful secondary boycott" as defined ~~in the~~ following subsections:

(e) The term "unlawful labor dispute" includes any controversy arising out of a demand—

(1) That an employer commit a criminal offense or unfair employment practice in violation of chapter one hundred and fifty-one B or unfair labor practice either in violation of chapter one hundred and fifty A, or in the violation of the National Labor Relations Act;

(2) That an employer include in a collective bargaining agreement any provision the execution or performance of which would be unlawful;

(3) That an employer recognize or bargain collectively with any labor organization as the representative of its employees in any bargaining unit while another labor organization is the representative of such employees certified by the labor relations commission established by section nine O of Chapter twenty-three, or by the National Labor Relations Board, prior to the time said commission, or board, would conduct a new investigation and certification of representatives.

(4) That an employer recognize or bargain collectively with any labor organization as the representative of its employees in any bargaining unit within one year after the labor relations commission established by section nine O of chapter twenty-three has determined in a proceeding under section five of chapter one hundred and fifty A that such employees do not desire to be represented by such labor organization; or.

(5) Made by any party to a jurisdictional dispute as defined in section nine B of chapter two hundred and fourteen who has failed to abide by any voluntary arbitration procedure applicable to such dispute or to comply with the terms of the arbitration award.

(f) The term "unlawful secondary boycott" means any strike, slowdown, boycott or concerted cessation of work or withholding of patronage or services, arising out of a labor dispute, where an object thereof is to force or require any person not otherwise engaged in such labor dispute to cease using, selling, handling, transporting, or dealing in

the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; provided, however, that a secondary boycott may be lawfully directed at a person the greater part of whose current business over a representative period is processing, selling, handling, transporting or otherwise dealing in the goods of an employer primarily interested in a lawful labor dispute or who, by any agreement, understanding or arrangement with such employer, is requiring his own employees to perform work or services which would be done by the employees of such employer in the absence of a labor dispute (1950, 452, §§ 1, 2, appvd. May 11, 1950; effective 90 days thereafter).

Sec. 24. Peaceful Persuasion Not Penalized. No person shall be punished criminally, or held liable or answerable in any action at law or suit in equity, for persuading or attempting to persuade, by printing or otherwise, any other person to do anything, or to pursue any line of conduct not unlawful or actionable or in violation of any marital or other legal duty, unless such persuasion or attempt to persuade is accompanied by injury or threat of injury to the person, property, business or occupation of the person persuaded or attempted to be persuaded or by disorder or other unlawful conduct on the part of the person persuading or attempting to persuade, or is a part of an unlawful labor dispute or unlawful secondary boycott; or is a part of an unlawful or actionable conspiracy and not a part of a lawful labor dispute, nor for attending in the course of a lawful labor dispute, at any place, where such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating, information or of so persuading or attempting to persuade. (1913, 690; 1933, 272, appvd. June 16, 1933, 1950, 452, Sec. 4 appvd. May 11, 1950; effective 90 days thereafter.)

G. L. (Ter. Ed.) c. 214

Section 9A Injunctions in Labor Disputes (1) No court shall have jurisdiction to issue a preliminary or permanent

injunction in any case involving or growing out of a labor dispute, as defined in section twenty C of chapter one hundred and forty-nine, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, it offered, and except after findings of fact by the court, to the effect—

(a) The unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;

(b) That substantial and irreparable injury to the complainant's property will follow;

(c) That as to each item of relief granted greater injury will be inflicted upon the complainant by the denial of relief than will be inflicted upon the defendants by the granting of relief;

(d) That the complainant has no adequate remedy at law; and

(e) That the public officers charged with the duty to protect the complainant's property are unable or unwilling to furnish adequate protection.

(2) Such hearing shall be held after due and personal notice thereof has been given, in such manner as the court shall direct, to all known persons against whom relief is sought, and also to the chief of those public officials of the city or town within which the unlawful acts have been threatened or committed charged with the duty to protect the complainant's property; provided, however, that if a complainant shall also allege that, unless a temporary restraining order shall be issued without notice, a substantial

and irreparable injury to the complainant's property will be unavoidable, such a temporary restraining order may be issued upon testimony under oath, sufficient if sustained, to justify the court in issuing a preliminary injunction upon a hearing after notice, and a statement of the grounds justifying the issuance of such order shall be made a matter of record by the court; provided, further, that no such temporary restraining order shall be issued except upon its also being made to appear to the satisfaction of the court (either from the testimony of witnesses or from written assurances filed by counsel in regard to his personal conduct)—

(A) That a principal representative or attorney of the employees or labor organization participating in such dispute was informed of the time and place at which the application for a temporary restraining order would be presented sufficiently in advance to appear in opposition thereto; or

(B) That the complaint made every reasonable effort to comply with paragraph (A) but was unable so to do; provided, however, that notification by mail alone shall not be deemed compliance with this section without proof of receipt.

Such testimony or written assurances shall set forth in detail the manner in which the complainant complied with paragraph (A) or (B) and shall be made part of the record in the case. If the defendants appear in opposition to the application for a temporary restraining order they shall be afforded an opportunity to cross-examine the complainant's witnesses at such length as is reasonable under the circumstances and a like opportunity to introduce evidence in opposition thereto. Such a temporary restraining order shall be effective for no longer than five days and shall become void at the expiration of said five days and shall not be subject to renewal. No temporary restraining order or preliminary injunction shall be issued except on condition

that the complainant shall first file an undertaking with adequate security in an amount to be fixed by the court sufficient in its opinion to recompense those enjoined for any loss, expense or damage caused by the improvident or erroneous issuance of such order or injunction, including all reasonable costs (together with a reasonable attorney's fee) and expense of defense against the order or against the granting of any injunctive relief sought in the same proceeding and subsequently denied by the court.

(3) The undertaking herein mentioned shall be understood to signify an agreement entered into by the complainant and the surety upon which a decree may be rendered in the same suit or proceeding against said complainant and surety, upon a hearing to assess damages of which hearing the complainant and surety shall have reasonable notice, the said complainant and surety submitting themselves to the jurisdiction of the court for that purpose. But nothing herein contained shall deprive any party having a claim or cause of action under or upon such undertaking from electing to pursue his ordinary remedy by action at law or suit in equity.

(4) No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or, who has failed to make every reasonable effort to settle such dispute, either by negotiation or with the aid of any available governmental machinery or mediation or voluntary arbitration.

(5) No restraining order, other than a temporary restraining order issued without notice as provided in subdivision (2) of this section, and no preliminary or permanent injunction shall be granted in a case involving or growing out of a labor dispute, except on the basis of findings of fact made and filed by the court in the record of

the case prior to the issuance of such restraining order or injunction; and every restraining order or injunction granted in a case involving or growing out of a labor dispute shall include only a prohibition of such specific act or acts as may be expressly complained of in the bill of complaint or petition filed in such case and as shall be expressly included in said statement of grounds or findings of fact made and filed by the court as provided herein.

(6) Whenever the court shall issue or deny a preliminary injunction in a case involving or growing out of a labor dispute, the court, upon the request of any party to the proceeding, shall forthwith report any questions of law involved in such issue or denial to the supreme judicial court and stay further proceedings except those necessary to preserve the rights of the parties. Upon the filing of such report, the questions reported shall be heard in a summary manner by a justice of the supreme judicial court, who shall with the greatest possible expedition affirm, reverse or modify the order of the superior court. The decision of such justice of the supreme judicial court upon the questions so raised shall be final, but without prejudice to the raising of the same questions before the full court upon exceptions, appeal or report after a final decree in the case. (1935, 407 § 4, appvd. July 12, 1935; 1950, 452, § 3, appvd. May 11, 1950; effective 90 days thereafter.)

G.L. (Ter. Ed.) c. 93

Section 2. Monopolies and Discrimination in the Sale of Articles, etc., in Common Use Prohibited. Every contract, agreement, arrangement, combination or practice in violation of the common law whereby a monopoly in the manufacture, production, transportation or sale in the commonwealth of any article or commodity in common use is or may be created, established or maintained, or whereby competition in the commonwealth in the supply or price of any such article or commodity is or may be restrained, or

prevented or whereby, for the purpose of creating, establishing or maintaining a monopoly within the commonwealth of the manufacture, production, transportation or sale of any such article or commodity, the free pursuit in the commonwealth of any lawful business, trade or occupation is or may be restrained, or whereby the price of any article or commodity in common use is or may be unduly enhanced within the commonwealth, is hereby declared to be against public policy, illegal and void.

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IN THE

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No. 33

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Petitioners,

v.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPERIOR COURT OF THE COMMONWEALTH OF MASSACHUSETTS

SUPPLEMENTAL BRIEF FOR RESPONDENT

WILLIAM T. GRIFFIN,
233 Broadway,
New York, New York,

HERBERT BURSTEIN,
135 Broadway,
New York, New York,
Of Counsel.

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Petitioners,

v.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

Respondent.

SUPPLEMENTAL BRIEF FOR RESPONDENT

Preliminary Statement

Respondent respectfully requests consideration of this supplemental brief. Respondent believes that the issue reviewed here will aid this Court in resolving the questions presented by this appeal.[1]

[1] Respondent's principal brief (pp. 20-26) discusses one aspect of the problem. An adequate appraisal of the broad issue of pre-emption requires the analysis suggested in this supplemental brief.

POINT I

Petitioners carried on their alleged dispute with the motor carriers at the premises of the neutral railroad and their activities were neither protected nor prohibited by the Labor Management Relations Act, 1947. Accordingly, the Massachusetts Court had jurisdiction to grant injunctive relief.

It is conceded by the Petitioners that there was no dispute with the Respondent concerning piggy-back operations, notwithstanding that this service had been performed since 1937 (R. 50).[2]

The Petitioners allege that there was a primary dispute with the motor carriers which involved a demand for a limitation of piggy-back operations (Petitioners' brief, pp. 8, 12). However, instead of picketing the motor carriers at their readily accessible terminals, Petitioners picketed only at the premises of the neutral Respondent. The purpose of the partial strike and the picketing was, as the Massachusetts Court found, to exert pressure on the neutral Respondent and, by shutting down the railroad's facilities, prevent the Respondent from transporting trailers for the motor carriers (R. 310).

This conduct poses the question whether employees who have a dispute with their employer are engaged in protected concerted activities when they strike or picket only at the premises of a neutral party and, by forcing the latter to cease doing business with their employer, attempt to resolve the dispute in that manner.

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[2] This service had never been prohibited by a collective bargaining agreement with the motor carriers (R. 122-126). Respondent's investment at the date of trial exceeded $3,000,000. The facilities were specially adapted for this special type of transportation and the flat cars have no value for other railroad purposes (R. 58). Since the date of the decision by the State court in this case, piggy-back operations have been inaugurated by a large number of railroads which have invested millions of dollars in this service.

Respondent submits that picketing conducted exclusively at the premises of a neutral party, in order to compel a cessation of business with the primary employer, does not constitute "concerted activities" within the meaning of Section 7 of the Act. Where a union extends its picket line to the premises of other employers and thereby abandons the scene of its actual dispute with the primary employer its activities are no longer within "the protected area of primary picketing." *In the Matter of International Brotherhood of Teamsters, etc. and Shultz Refrigerated Service, Inc.*, 87 N. L. R. B. 502, 506.[3]

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[3] Secondary picketing is protected in only a limited number of well defined instances: farming out struck work to a subcontractor who is an "ally", *Douds* v. *Metropolitan Federation of Architects, etc.*, 75 F. Supp. 672 (D. C. N. Y.), but not where the subcontractor is truly independent, *In the Matter of Metal Polishers, etc. and Climax Machinery Company*, 86 N. L. R. B. 1243; inducing employees of a secondary employer to refuse to work or perform services at the premises of the primary employer whose employees are on strike, *In the Matter of Newspaper and Mail Deliverers Union of New York and Vicinity and Interborough News Company*, 90 N. L. R. B. 2135, *In the Matter of Oil Workers International Union, Local Union 346 (CIO) and The Pure Oil Company*, 84 N. L. R. B. 315; adopting and publishing unfair lists provided there is no inducement of neutral employees at the neutral employer's premises, *Amalgamated Meat Cutters, etc. and Western, Inc.*, 93 N. L. R. B. 336; *In the Matter of Denver Building and Construction Trades Council and The Grauman Company*, 87 N. L. R. B. 755; picketing of a movable situs where the employer has no accessible premises where the picketing may be conducted and the grievances communicated to the public, *In the Matter of International Brotherhood of Teamsters, etc. and Shultz Refrigerated Service, Inc.*, 87 N. L. R. B. 502, *In the Matter of Sailors' Union, etc. and Moore Dry Dock Company*, 92 N. L. R. B. 547; but not in the instances where the primary employer has readily accessible premises which the union may picket in order to publicize its dispute, *Brewery and Beverage Drivers, etc. and Washington Coca Cola Bottling Works*, 107 N. L. R. B. 299, see, too, *International Brotherhood of Teamsters, etc.*, 112 N. L. R. B. No. 3; *In the Matter of International Brotherhood of Teamsters, etc. and Sterling Beverages, Inc.*, 90 N. L. R. B. 401; where a "hot cargo" clause has been voluntarily assented to by the secondary employer, *In the Matter of International Brotherhood of Teamsters and Conway's Express*, 87 N. L. R. B., 972, sub. nom. *Rabouin* v. *National Labor Relations Board*, 195 F. 2d 906 (C. A. 2); inducement

(A) Petitioners' Secondary Activities Were Not Protected.

The locus of a union's activities determines whether or not it is protected. Concededly, where an employer and its employees have a labor dispute, picketing at the employer's premises is primary and a protected concerted activity, if the means and objectives are lawful. It follows, too, that if the Petitioners' conduct was protected, the Massachusetts Court had no jurisdiction of the suit. *International Union of United Automobile, etc., Workers, etc.* v. *O'Brien*, 339 U. S. 454.

The phrase "concerted activities" was never so liberally construed as to embrace every type of employee activity. Thus, sit-down strikes, mutinous strikes on board ship and strikes in violation of a contract, were not protected concerted activities under Section 7 of the Wagner Act. *National Labor Relations Board* v. *Fansteel Metallurgical Corporation*, 306 U. S. 240; *Southern Steamship Company* v. *National Labor Relations Board*, 316 U. S. 31; *In the Matter of Scullin Steel Company, etc.*, 65 N. L. R. B. 1294; *In the Matter of Joseph Dyson & Sons, Inc., etc.*, 72 N. L. R. B. 445.

It is clear that when the Wagner Act was amended, Congress did not intend to discard or abandon the well-established decisional precedents of the Labor Board and this Court. Thus, the first bill introduced in the House of Representatives to amend the Wagner Act, specifically excluded certain types of activity from the scope of Sec-

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limited to the secondary employer or the latter's supervisors. *In the Matter of Local Union No. 878, etc. and Arkansas Express, Inc.*, 92 N. L. R. B. 255. It is to be noted also that the proviso to Section 8(b)(4) is carefully limited to concerted action occurring at the situs of the primary dispute and to situations involving approved strikes. *In the Matter of Newspaper and Mail Deliverers Union of New York and Vicinity and Interborough News Company*, 90 N. L. R. B. 2135, 2149.

tion 7.[4] The Senate resisted this attempt to so modify or amend that section. The House then withdrew its proposals relying on the fact that the Labor Board and the courts previously ruled that many of the activities described in the House bill were not protected concerted activities. Moreover, it was believed that the enumeration of specific unprotected activities might imply that unlawful conduct not otherwise described in the amended Section 7 was protected.[5] 1 Legislative History of the Labor Management Relations Act 1947, pp. 542-543.

Plainly, the design of the Act was to put a rein on activities of the unions and employees previously held protected under the Wagner Act, and to insulate "unoffending employers and others from pressures in controversies not their own." *National Labor Relations Board* v. *Denver Building and Construction Trades*, 341 U. S. 675, 692.

The Petitioners' contention that the secondary activity engaged in by the Union, in this instance, is protected concerted activity because it is not prohibited under Section 8(b)(4)(A) is specious. Section 8(b) is not a correlative of Section 7; it speaks only of labor organizations and their representatives, whereas Section 7 is concerned with the rights of employees. While it may be argued that employees who engage in activities proscribed by Section 8(b) are not protected by Section 7, the converse is not necessarily true. A union and its members who engage in conduct which does not violate Section 8(b) are not, thereby engaged in protected concerted activities. In the *Matter of*

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[4] Included in the definition of unprotected concerted activities were sympathy strikes, jurisdictional strikes, illegal boycotts (see, H. R. 3020, Section 2(14), defining illegal boycotts), among others. H. R. 3020. 1. Legislative History of the Labor Management Relations Act 1947, pp. 168, 204-207. Furthermore, the House of Representatives considered "picketing a place of business at which no labor dispute exists" to be an unlawful concerted activity. Ibid. p. 335.

[5] Section 7 was amended, of course, to guarantee to employees the right to refrain from engaging in concerted activities.

Perry Norvell Company, etc., 80 N. L. R. B. 225; *National Labor Relations Board* v. *Thayer Co. et al.*, 213 F. 2d 748 (C. A. 1). When a union and its members violate a labor contract, there is no unfair labor practice committed either by the Union or the employees. However, the employees who strike in violation of a contract, are not engaged in a protected concerted activity.

In the recent case of *Textile Workers Union of America, CIO, et al.* v. *N. L. R. B.*, —— F. 2d —— (C. A. D. C.) 29 L. C. (CCH), Paragraph 69,515, the union, in the course of collective bargaining engaged in various harassing tactics. The Labor Board held that the union committed an unfair labor practice. The Court of Appeals for the District of Columbia rejected the Board's finding but added:

> "Courts have held that similar union tactics are 'unprotected' in the sense that employers may lawfully discharge employees for using them."[6]

A contrary conclusion would lead to a *reductio ad absurdum*: a strike in violation of a collective labor agreement is not prohibited by Section 8(b)(4)(A); therefore, it is protected as a concerted activity under Section 7. The absurdity becomes more apparent when it is tested by the standard of recent decisions by the Labor Board and this Court holding that a strike in violation of a labor contract, not connected with a union unfair labor practice, is not a

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[6] The question as to the protected or unprotected character of activity arises, generally, in instances where an employer discharges the employees and is charged with an unfair labor practice. If the employees have engaged in an unprotected activity, the employer cannot be charged with an unfair labor practice. *National Labor Relations Board* v. *Rockaway News Supply Company, Inc.*, 345 U. S. 71; *In the Matter of Dorsey Trailers, Inc.*, 80 N. L. R. B. 478, enforcement denied, 179 F. 2d 589 (C. A. 5).

protected concerted activity.[7] If Petitioners' construction prevails, a union may violate collective labor agreements with impunity so long as it is sufficiently ingenious not to commit a simultaneous unfair labor practice.

To be sure, there is no precise definition of the phrase "concerted activities"; but it seems clear that both the Labor Board and the courts will hold activities outside the scope of Section 7 where the objective is inconsistent with the terms of the clearly enunciated policy of this Act or other federal statutes. To illustrate: an agreement between a union and employers to boycott the product of an out-of-state manufacturer which is not accompanied by an inducement of employees of a neutral employer to strike does not offend against Section 8(b)(4)(A). It does, however, violate the Sherman Act. *Allen Bradley Company, et al.* v. *Local Union No. 3, International Brotherhood of Electrical Workers*, 325 U. S. 797.[8] Obviously, Congress did not intend to immunize such boycotts against state or federal court action.

(B) The Railroad Has Standing to Institute This Action.

Concededly, if the motor carrier employers had discharged the striking employees for engaging in the partial strike at the Respondent's premises, the discharge would not have been an unfair labor practice. *In re W. L. Mead, Inc. etc.*, 113 N. L. R. B. No. 109, 36 LRRM 1392. It is true, of course, that the railroad is a stranger to the relationship between the motor carrier and their employees. But the only defense which the Petitioners and the em-

[7] The cases are set forth in Respondent's principal brief (pp. 22-23). A partial strike, such as engaged in by the motor carrier employees was condemned in *C. G. Conn, Ltd.* v. *National Labor Relations Board*, 108 F. 2d 390 (C. A. 7), and this case was cited with approval by the Supreme Court in *International Union, U. A. W. etc.* v. *Wisconsin Employment Relations Board*, 336 U. S. 245, 257.

[8] Congress did intend to proscribe the kind of activities involved in the *Allen-Bradley* case. But in such a case, there would be no violation of Section 8(b).

ployees might assert in any action to enjoin the Petitioners is the one advanced by the Petitioners, namely, that they were engaged in protected concerted activities. This defense, however, assumes, contrary to fact and law, that the strike and picketing were "concerted activities" within the meaning of Section 7. Acting upon this unproven assumption, Petitioners suggest that the State court was without jurisdiction. This leads Petitioners to reliance upon the doctrine of preemption. But there is preemption only where the conduct of the employees is protected by Section 7 or forbidden by Section 8(b)(4)(A). *International Union, U.A.W., etc.* v. *Wisconsin Employment Relations Board*, 336 U. S. 245.

The force of this argument is not attenuated by the decision in *International Union of United Automobile, etc. Workers, etc.* v. *O'Brien*, 339 U. S. 454, which involved a case of a state law which nullified the federal right to engage in protected concerted activities. In short, the foundation of the doctrine of preemption is the existence of a subject covered by a federal law, or, at least, a clear expression of a Congressional intention to occupy a whole field. No such clear expression appears in the Act.

In this case, the Massachusetts Court was free to act because the picketing at the railroad's premises and the coercive prohibition against loading and unloading of trailers amounted to a tortious interference with the railroad's business relationships and a boycott in violation of the applicable Massachusetts statutes.[9] *Giboney, et al.* v. *Empire Storage and Ice Company*, 336 U. S. 490. These activities were neither protected nor prohibited by the Labor Act. This is, indeed, "an instance of injurious conduct which the National Labor Relations Board is without express power to prevent." *Garner* v. *Teamsters, Chauffeurs, and Helpers, Local Union No. 776 (AFL) et al.*, 346 U. S. 485, 488.

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[9] The Massachusetts statute prohibits a secondary boycott even in the absence of an inducement of employees of a secondary employer to engage in a strike (Respondent's Brief, Appendix pp. vii-viii).

The Labor Board has no power to forbid a strike because its method is illegal. "Policing of such conduct is left wholly to the states." *International Union, U. A. W., etc.* v. *Wisconsin Employment Relations Board*, 336 U. S. 245, 253.

So long as the Respondent was directly injured by Petitioners' conduct, the Massachusetts Courts had jurisdiction and the question of Respondent's standing to maintain the suit was a matter for determination by that court. So, too, the scope of the injunction was solely within the competence of the Massachusetts Court. That Court had the power to fashion the necessary equitable relief and the injunction is not subject to review by this Court unless the Massachusetts Court impinges upon a federal right.

CONCLUSION

The Petitioners' conduct did not constitute a violation of Section 8(b) of the Act; the picketing activity of the employees did not amount to concerted activities within the meaning of Section 7; accordingly, the actions of the Petitioners were regulable by the State court.

Respectfully submitted,

WILLIAM T. GRIFFIN,
233 Broadway,
New York, New York,

HERBERT BURSTEIN,
135 Broadway,
New York, New York.

HERBERT BURSTEIN,
of Counsel.

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Respondent.

PETITION FOR REHEARING

WILLIAM T. GRIFFIN,
233 Broadway,
New York, New York,

HERBERT BURSTEIN,
135 Broadway,
New York, New York,

Attorneys for Respondent.

HERBERT BURSTEIN.

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THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

Respondent.

PETITION FOR REHEARING

The New York, New Haven & Hartford Railroad Company, Respondent, respectfully petitions, pursuant to Rule 58 of the Revised Rules of the Supreme Court of the United States, for a rehearing of the judgment of the Supreme Court entered herein on January 9th, 1956 which reverses the decision of the Supreme Judicial Court of the Commonwealth of Massachusetts and respectfully requests reargument herein.

In support of the petition, respondent respectfully shows and alleges:

I

The judgment of reversal and the opinion disclose an error of fact, a conclusion of law which is not supported by the legislative history of the Labor Management Relations Act, as amended (29 U. S. C. 141 *et seq.*) (hereinafter sometimes called the "Act"), and a failure to pass upon a fundamental question of law which must be the touchstone of the decision in this case.

Respondent respectfully states that the limitation of argument and the vague and indefinite character of the question before the Court did not accord Respondent a fair opportunity for a full and complete exposition of the issue upon which this Honorable Court decided the appeal.

II

The opinion of this Court incorrectly suggests a contention by Respondent that a charge of an unfair labor practice cannot be filed by a railroad. On the contrary, Respondent acknowledged that a railroad may file a charge (Respondent's Brief, p. 18). However, the thrust of Respondent's argument was, first, that a railroad is not a "person" within the meaning of Section 8(b)(4) of the Act (29 U. S. C. 158(b)(4)) so that, as a matter of law, there was not and could not be a secondary boycott as defined in Section 8(b)(4)(A) of the Act and, second, that decisions by the National Labor Relations Board (hereinafter called the "Board") indicated the futility of filing a charge.

The mere fact that the Board's Rules and Regulations permit the filing of a charge by any "person" does not, *a fortiori*, establish that a railroad is a "person" within the meaning of Section 8(b)(4) of the Act or that the right to file a charge restricts the charging party to the remedies under the Act. Even if the Board's Rules are a proper implementation of the Act, the cardinal question is whether a railroad is a "person" within the meaning of Section 8(b)(4)(A), and whether, in the circumstances of this case,

there was a secondary boycott. This question is not one for primary determination by the Board. It is, exclusively, a question of law which depends for its resolution upon the meaning of the word "person," as employed in the Act, rather than in the Board's rules.

Of course, this Court did conclude that railroads "are not excluded from the Act's definition of a 'person'" and consequently railroads are "entitled to Board protection from the kind of unfair labor practice proscribed by Section 8(b)(4)(A)." This conclusion, Respondent respectfully submits, is supported neither by legislative history nor by the canons of statutory construction.

The process of construing the word "person," when employed in regulatory statutes, is not mechanical. The sense in which Congress employs the word can be determined only after an analysis of the broad purposes and objectives of the statute and its legislative history (*United States of America* v. *Public Utilities Commission of the State of California*, 345 U. S. 295; *Helvering* v. *Hutchings*, 312 U. S. 393; *United States* v. *Alpers*, 338 U. S. 680).

A review of the legislative history of the Wagner Act and the Labor Management Relations Act show, first, that Congress did not intend to include railroads within the meaning of the term "person" and, second, that since the Act was designed to establish a scheme of correlative rights and duties, the term "person" was limited to those employers and labor organizations subject to the provisions of the Act.

Briefly, the definition of "person" appeared in the first draft of the Wagner Act introduced in the Senate. 1 Legislative History, National Labor Relations Act, p. 1071. Section 2(1) of that Act omitted reference to labor organizations. The second Senate print of S. 2926, which was introduced in the Senate, incorporated in Section 2(1) the words "labor organizations" as part of the definition of "person". 1 Legislative History, National Labor Relations Act, p. 1085.

On February 15, 1935 Senator Wagner introduced S. 1958 as a substitute for S. 2926. Section 2(1) of that bill omitted labor organizations from the definition of "person". Senator Wagner also submitted an explanation of S. 1958. Included in Senator Wagner's statement was a memorandum comparing S. 1958 with S. 2926. It was there pointed out that the definition in S. 1958, which omitted labor organizations entirely, pluralized "all terms, to take account of multiple parties *defendant* without the necessity of repetition throughout the act" (italics supplied). 1 Legislative History, National Labor Relations Act, pp. 1296, 1342.

Reference to the word "defendant" is significant because it shows that the term "person" was intended to apply only to those who may be charged with an unfair labor practice.

The omission of labor organizations from the definition of "person" in the Wagner Act is consistent with this construction, since there were no union unfair labor practices under that Act and a labor organization could not be a defendant in a Section 10 proceeding. However, when the Wagner Act was amended and Congress legislated union unfair labor practices, the definition of "person" was amended to expressly include labor organizations and to thereby remove any doubt that labor organizations could be defendants in an unfair labor practice proceeding. 1 Legislative History of the Labor Management Relations Act, p. 535.

Clearly, a railroad can never be a defendant under the Act. It must be conceded that if a railroad refused to bargain with its employees or their representatives, it could not be guilty of an unfair labor practice under Section 8(a). If a union of railroad employees induced a strike which created a secondary boycott, the activity would not be embraced within Section 8(b)(4). So, too, if railroad employees are induced to strike, and the strike generated a secondary boycott, there can be no violation of

Section 8(b)(4). It appears, therefore, that the opinion of the Court may be rationalized only by assuming that in the remote instance where a railroad is a victim of a secondary boycott, it is a "person" under the Act for that limited purpose only. Certainly, such a construction of the term "person" does not accord with the principles enunciated by this Court in *United States* v. *Cooper Construction,* 312 U. S. 600, and other landmark cases.

If the Act is read in its entirety, it becomes evident that the word "person" could not have been intended to apply to a railroad. Section 10 of the Act employs the term "person" in various contexts which unmistakably exclude railroads.

The suggestion that a person not included within the definition of "employer" may be considered a "person" for the purposes of Section 8(b)(4) was rejected by the Board in *Al J. Schneider,* 87 NLRB 99, where the Board held:

> "The findings and policies of the Act demonstrate beyond a shadow of a doubt that Congress legislated a scheme of correlative rights and duties attaching to employees, employers and labor organizations from which government as 'employer' was intentionally excluded. Indeed, the entire thrust of the Act is upon the right of employees in private industry to organize and bargain collectively with employers 'organized in corporate or other forms of ownership association.'"

It is true that the *Schneider* case involved a governmental agency. It is also true that the Board in that case acknowledged that a governmental agency is not foreclosed from filing a charge. Nevertheless, the Board held that since a labor organization could not secure the issuance of a complaint against a governmental agency, to hold that a governmental agency is a person for the purposes of Section 8(b)(4) would frustrate the scheme and policy of the Act.

By a parity of reasoning, since there are no correlative rights between a railroad and a labor organization subject to the Act, since a labor organization could never secure the issuance of a complaint against a railroad under the Act, the term "person" should no more be extended to include railroads than to include government agencies and corporations.

Finally, it must be noted that the Court's construction of the word "person" does not harmonize the Railway Labor Act and the Labor-Management Relations Act. If a charge were filed by Respondent and the Board determined that petitioners' activities were protected, then it would become a rule of law that non-railroad employees may interfere with and prevent the operation of a railroad while railroad employees, who engaged in the identical activities, are subject to the inhibitions of the Railway Labor Act. Certainly, Congress did not intend to create classes of employees with distinctions in rights.

It is manifest that the basic design of Congress, as disclosed in railroad legislation, was not to subject railroads to the restrictions, limitations and remedies of the Labor Management Relations Act. Indeed if the Congressional purpose were otherwise, the definition of "employer" would not have been carefully re-written to specifically exclude railroads. Surely, when Congress amended the definition of "person", it could have included railroads by the addition of a simple phrase. Congress did not do so because it never intended to restrict railroads to administrative processes other than those enacted in the Railway Labor Act.

For the reasons herein stated, Respondent respectfully submits that a railroad is not a "person" within the meaning of Section 8(b)(4) and therefore there was not the type of activity proscribed by the Act and over which the Board had jurisdiction.

In its opinion, the Court points out that the parties agree and the Massachusetts Court found that there was no labor dispute between the Respondent and its employees and that the Petitioner "was in no way concerned with the respondent's labor policy." The Court then states that there was no claim "that the union interfered in any manner whatsoever with the railroad employees." This finding is not supported by the record. Thus, in their Petition for a Writ of Certiorari, the Petitioners stated that when trailers are driven on to the flat cars by employees of New England Transportation Company, they are secured to the flat cars by employees of the railroad (Petition, p. 4). In Petitioners' brief, the identical fact is again asserted (Petitioners' brief, p. 4). Confirmation of this fact is also found in the record (R. pp. 50, 68-69, 74).

Clearly, with respect to trailers which were not permitted to enter the Respondent's yard, employees of the Railroad were not permitted to perform their duties of fastening the trailers to the flat cars and, as a consequence, were rendered idle by reason of the Union's activities.

As the Massachusetts Supreme Judicial Court pointed out, the Petitioners were attempting "to eliminate or restrict competition by the railroad" (R. 311). There is no greater impact upon, and interference with, workers than an actual or a threatened loss of employment opportunities.

Concededly, there was no active inducement of railroad employees to cease work, but the inevitable effect of the Union's activity was to prevent railroad employees from working.

There was no opportunity for argument of this aspect of the case nor did the question before this Court suggest that this problem be discussed. To be sure, this Court is under no obligation to instruct counsel as to matters which are embraced within the framework of an appeal. The fact is, however, that the question presented nowhere indicated that this was a vital question to be resolved.

IV

The grave economic consequences which are certain to follow the decision of this Court are significant not only to railroads and motor carriers, but to the national welfare.

Briefly, in 1953 only six railroads provided "piggy back" service. In 1956, 34 railroads instituted this service. Thus, in 1955, the Southern Pacific Railroad handled 37,736 trailers; the New Haven Railroad handled 30,000 trailers. Involved in the "piggy back" service are millions of dollars of investment and operation revenues, and the livelihood of thousands of railroad and motor carrier employees. In addition, many thousands of persons are employed in the manufacture of special railroad cars and trailers.

"Piggy back" operation has created a revolution in rail and motor transportation. Practically every class and kind of commodity is transported by way of "piggy back" service.[1]

A disruption of this vital service and economic catastrophe for tens of thousands of employers and employees engaged in this unique and specialized service is now threatened.

Respondent recognizes, of course, that this Honorable Court cannot fabricate legal principles to meet economic exigencies nor does Respondent seek such relief. Respondent contends only that the broad and basic economic and legal issues implicit in this case reasonably require further consideration by this Court and a more complete opportunity for argument and exposition than was accorded.

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[1] 139 Railway Age, 36-55 (December, 1955); IX Railway Progress, 12-17 (January, 1956); 10 Modern Railroads, 61-72, (December, 1955).

V

For all of the reasons herein set forth, Respondent respectfully submits that a rehearing should be granted.

Respectfully submitted,

WILLIAM T. GRIFFIN,
233 Broadway,
New York City,

HERBERT BURSTEIN,
135 Broadway,
New York City,

Attorneys for Respondent.

HERBERT BURSTEIN,
of Counsel.

Certificate

I hereby certify that this petition is presented in good faith and not for delay and I further certify that copies of this petition have been served on opposing counsel by depositing in the U. S. mail on this, the 2nd day of February, 1956.

HERBERT BURSTEIN.